* Together with Second Judicial District Court of Nevada, County of Washoe (Eddington, Real Party in Interest) v. Nevada

No. 1091

SUPREME COURT, U. S.
JAN 1968
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1967

No. 1066

J. MACARTHUR WRIGHT,
Petitioner,
vs.
THE STATE OF NEVADA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the Supreme Court of the
State of Nevada

VARGAS, BARTLETT & DIXON,
BRIAN L. HALL,
195 South Sierra Street,
Reno, Nevada 89501.
Attorneys for Petitioner.

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Petitioner J. MacArthur Wright, by and through his attorneys, Vargas, Bartlett & Dixon, prays that a Writ of Certiorari issue to review the judgments of the Supreme Court of the State of Nevada.

A. OPINIONS BELOW

The Trial Judge sustained a Demurrer to the original Indictment in the above matter on the grounds

of misjoinder on November 15, 1966. This decision was not reported nor appealed and under date of November 29, 1966 the Grand Jury reindicted without taking further evidence although petitioner requested the right to appear and be heard.

The Trial Court issued an order discharging the petitioner on a Writ of Habeas Corpus on the grounds that the transcript of testimony before the Grand Jury was not sufficient to constitute probable cause for the finding of the Indictment. The State appealed from this order and the Nevada Supreme Court reversed this decision by Opinion filed September 25, 1967, and reported in 432 P.2d 87 (not yet reported in Nevada Official Reports, but referred to by Nevada State Supreme Court as Nos. 5363 and 5364), being Appendix A attached hereto.

A Petition to Enlarge the Record so as to permit petitioner herein, as respondent before the State Supreme Court, to enlarge the record and thereby present other questions to the Supreme Court was denied by the Nevada State Supreme Court on July 12, 1967. A Motion for Rehearing and to Correct Misstatement of Fact was denied October 13, 1967. (See Nevada State Supreme Court Record.)

Subsequently petitioner filed another Petition for Writ of Habeas Corpus under date of October 23, 1967, setting forth grounds which petitioner felt had not been passed upon in the Opinion of the Supreme Court above mentioned. Thereafter the State obtained an order granting a Permanent Writ of Prohibition against the District Judge who had issued the Writ

of Habeas Corpus and was going to hold a hearing thereon, said Permanent Writ of Prohibition being included herein as Appendix B.

B. JURISDICTION

i. The last judgment of the Nevada State Supreme Court was entered and filed November 8, 1967, as appears from Appendix B. All other decisions, both before the Trial Court and the State Supreme Court, were prior to this date.

ii. There was no order regarding a rehearing nor any order granting an extension of time within which to petition for certiorari.

iii. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C., Section 1257 (3).

C. QUESTIONS PRESENTED

1. Do the Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States require that a presentation to a Grand Jury be made by an unbiased prosecutor and in a fair manner?

2. May a State Supreme Court, by use of a Writ of Prohibition, effectively suspend the use of the Writ of Habeas Corpus?

3. Was the evidence presented before the Grand Jury sufficient to justify the finding of an Indictment?

4. Is Section 172.270 Nevada Revised Statutes (hereinafter referred to as N.R.S.), which gives the Grand Jury the power to refuse to hear evidence for the defendant, violative of the Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States of America as being a denial of due process or denial of equal protection under law?

5. Has petitioner been denied his right to a speedy trial as provided by the Sixth Amendment of the Constitution of the United States?

6. Was petitioner reindicted in violation of N.R.S. 174.280 and thus deprived of constitutional due process?

D. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment V, Constitution of the United States:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment VI, Constitution of the United States:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

Amendment XIV, Constitution of the United States, provides in part as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, Section 9, Constitution of the United States, provides in part as follows:

> *"Limitations on powers of Congress. . . .*
>
> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it. . . ."

Article 1, Section 5, Constitution of the State of Nevada:

"*Suspension of habeas corpus.* The privilege of the writ of Habeas Corpus, shall not be suspended unless when in cases of rebellion or invasion the public safety may require its suspension."

Nevada Revised Statutes, Section 172.260 provides in part as follows:

"*Evidence Receivable before grand jury.*

2. The grand jury can receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence."

Nevada Revised Statutes, Section 172.270:

"*Grand jury not bound to hear evidence for defendant, but may order production of explanatory evidence; issuance of process for witnesses.* The grand jury is not bound to hear evidence for the defendant. It is their duty however, to weigh all evidence submitted to them, and when they have reason to believe that other evidence within their reach will explain away the charge, they must order such evidence to be produced, and for that purpose may require the district attorney to issue process for the witnesses."

Nevada Revised Statutes, Section 172.280:

"*Degree of evidence to warrant indictment.* The grand jury ought to find an indictment when all the evidence before them, taken together, is such as, in their judgment, would, if unexplained and uncontradicted, warrant a conviction by the trial jury."

Nevada Revised Statutes, Section 178.495:

> *"Defendant dismissed if not tried within 60 days after finding of indictment, filing of information.* If a defendant whose trial has not been postponed upon his application is not brought to trial within 60 days after the finding of the indictment or filing of the information, the court shall order the indictment or information to be dismissed, unless good cause to the contrary is shown."

E. STATEMENT OF FACTS

Question 1: The principal prosecutor, Daniel R. Walsh, had represented the State in a previous civil proceeding involving this defendant and the witnesses who appeared and testified against the defendant before the Grand Jury in a receivership action which was dismissed and later renewed by the State.

On this question the record shows in the transcript before the Grand Jury (see District Court Records) that the prosecutors presented a myriad of hearsay evidence favorable to the prosecution and permitted voluntary statements and prejudicial testimony to be presented. When a witness favorable to the defendant wished to make a hearsay statement he was admonished to refrain from doing so. (Vol. II, Grand Jury Transcript, pp. 330-331.) The other matters of prejudice on the part of the prosecutors are as set forth in Appendix C hereto.

Question 2: Petitioner filed the Petition for Writ of Habeas Corpus (Appendix C) before the Second Judicial District Court of the State of Nevada, in and for the County of Washoe on October 23, 1967. On Monday, November 6, 1967, petitioner received a telegram which is marked "Appendix D" and annexed to this petition. When counsel appeared pursuant to the telegram he was served with a Petition for Alternative Writ of Prohibition, and after an informal, unreported, in-Chambers hearing on the matter the Supreme Court of the State of Nevada issued a Permanent Writ of Prohibition found in Appendix B.

Question 3: In this connection, the Supreme Court improperly reversed the trial judge, and to demonstrate the lack of understanding in its Opinion the Supreme Court stated:

> "The record also shows payments totalling $15,000 to Wright as counsel fees, and almost $43,000 in 'travel expense', each without approval of the Board."

As a reading of the transcript before the Grand Jury will reveal this statement is not correct, and as indicated in the Supreme Court record no consideration was given by the Supreme Court to the request of petitioner to correct this misstatement of fact, even though considerable publicity was given to the statement by the Nevada newspapers. It is curious that this particular contention was never made by the prosecution in any argument preceding the Nevada Supreme Court Opinion.

With reference to the other statements in the Supreme Court Opinion to justify a finding that this petitioner might be guilty of embezzlement, the basic error of the Court is that they seemed to think that failure to get the approval of a Board of Directors to pay counsel fees could constitute embezzlement.

Question 4: Under this question the only significant point is that in this case the defendant did request, both by telegram and by letter, the right to appear before the Grand Jury and be heard and this was denied him. (See Appendix E and Exhibits A and B attached to Appendix C.)

Question 5: Although N.R.S. 178.495 provides for a trial within sixty (60) days of the finding of the Indictment, the time elapsed from the date of the second Indictment of November 29, 1966 and the time that the Trial Court decided the matter on May 19, 1967, was 171 days. The Trial Court held the matter under submission from the date of the hearing on January 19, 1967 to May 19, 1967, during which time briefs were filed, for a total of 120 days from the date of concluding argument to the time of decision.

Question 6: As appears from the original record of the District Court in the decision of Judge John W. Barrett under date of November 15, 1966, while he did direct the case to be submitted to another or the same Grand Jury as provided by statute, he further gave the right to the Attorney General to decide how, when and why he would proceed.

F. MANNER AND TIME OF RAISING FEDERAL QUESTIONS BEFORE STATE COURT

Question 1: In petitioner's judgment the first time the question was properly presented to the state trial or appellate court was by the Petition for Writ of Habeas Corpus filed October 23, 1967, Appendix C herein. This matter was never heard because it was precluded from being heard by the Supreme Court's Permanent Writ of Prohibition, Appendix B.

Question 2: This question is raised before the United States Supreme Court for the first time because, by its action, the Nevada State Supreme Court created this question for the first time. The date of this Writ was November 8, 1967, Appendix B.

Question 3: This question was first determined favorably to petitioner by the Trial Court on May 18, 1967. This determination was reversed by the Supreme Court of Nevada on September 25, 1967, Appendix A. For the reason that petitioner wanted to exhaust all possible remedies before the state courts before seeking relief from the Federal courts and to raise all possible questions before the state courts, petitioner filed a new Petition for Writ of Habeas Corpus in the state court, Appendix C, raising the other questions, with the exception of Question 2, which are presented in this petition. It is petitioner's position that the time for the consideration of all points here should commence to run from the date of the issuance of the Writ of Prohibition.

Question 4: The first time this question was formally presented to any Nevada court was by Ap-

pendix C, and the same has not been ruled on except by the Writ of Prohibition, Appendix B.

Question 5: This question was properly raised for the first time in Appendix C.

Question 6: This question was properly raised for the first time in Appendix C.

Explanatory Comment: In petitioner's Reply Brief to the State Supreme Court wherein petitioner was respondent and the State was appellant and the State insisted that the only question was the sufficiency of the evidence, nevertheless on pages 1 and 2 petitioner sought to raise all of the constitutional questions herein involved, except interference with the use of the Writ of Habeas Corpus by the Supreme Court. It is petitioner's position in seeking this Writ of Certiorari that these questions were properly raised for the first time before the State courts in Appendix C and that Appendix B has effectively prohibited a determination of this point by the State court.

In support of this position petitioner filed a Motion to Enlarge the Record on Appeal on July 7, 1967, so as to give proper consideration to these points, which Motion was denied July 12, 1967. (See Record on Appeal, Nevada State Supreme Court.)

In appellant's opening brief to the Supreme Court, as "Statement of Issues", it was stated:

> "Whether there is sufficient competent evidence presented to the grand jury in order to show probable cause to hold defendants for trial." (Appellant's Opening Brief, Supreme Court Nos. 5363 and 5364, p. 1.)

In appellant's reply brief it asked the Court to limit oral argument to the issue of probable cause although this brief does contain some discussion as to the other points sought to be raised by J. MacArthur Wright's answering brief. In reference to Count I in that brief the State had the following to say:

> "V. Bias Presentation.
>
> Argument of respondent in this regard on page 14 lacks citation of authorities in support. We don't believe there are any. We don't feel that the record reflects a biased presentation, even if the point had some merit. We reject, without further comment, the contention that we concealed facts. Directors on the opposite side of the fence in a corporate fight such as this are no more disqualified from testifying than a bank teller on the opposite side of the counter from a thief and on the wrong end of a gun." (Appellant's Reply Brief, p. 27.)

By its order refusing the right to have the record enlarged, the Supreme Court in its Opinion (Appendix A) precluded a proper consideration of these constitutional points on this appeal.

When petitioner sought a hearing on these same points before the District Court, the Supreme Court effectively precluded any such consideration by its Writ of Prohibition.

Apparently it is the position of the Supreme Court of Nevada, and counsel for the State of Nevada, that the phrase found in the last paragraph of the Opinion (Appendix A), to wit,

> "Other contentions respecting the two indictments have been considered and are without substance.",

was in fact a final pronouncement of Nevada's only court of appeal on the important constitutional question which had been sought to be raised. A complete answer to this position would seem to be found in the first sentence of the Opinion (Appendix A), to wit,

> "The issue presented by this consolidated appeal is the legal sufficiency of the evidence upon which a grand jury acted in returning two indictments charging embezzlement.".

Neither petitioner nor his counsel were served with a copy of the Petition for Writ of Prohibition until the morning of November 8, 1967, and the Petition was for an Alternative Writ and yet the same day the Supreme Court peremptorily issued its Permanent Writ of Prohibition. This in itself might be questionable due process.

The case is currently set for trial in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, commencing July 1, 1968, although here again the State has filed a Motion for an Early Trial and for Assignment of Judge, and this motion is pending before the Supreme Court at the present time.

G. BASIS FOR FEDERAL JURISDICTION

Not applicable to this case.

H. REASONS FOR GRANTING THE WRIT

Preliminary Comment: Anticipating that the contention might be made that the Permanent Writ of Prohibition pertains only to matters preliminary to the trial of the defendant, J. MacArthur Wright, petitioner urges the above entitled Court to rule upon the questions presented herein now so as to avoid the publicity, expense and time of a trial, the length of which has been estimated at six (6) weeks. The prosecution should be forced to be fair at all stages, including the accusatory stage, and to refuse to hear this petitioner now for the reason that his case has not been tried and that he might well be acquitted is not fair due process justice so far as this petitioner is concerned. Basically what petitioner is seeking is a rule of law that will require proper conduct at all stages of a criminal proceeding, including an accusatory proceeding. To deny this petition will put the stamp of approval on two systems of criminal justice in the State of Nevada:

First, for those accused by complaint, having the benefit of a preliminary examination, confrontation of accusers, presentation of evidence and cross-examination of witnesses as compared to,

Second, one where a prosecutor can get a Grand Jury to indict on evidence presented in a one-sided manner and from which hearing the defendant is effectively excluded.

1. As to the question of whether the presentation before a Grand Jury should be made by an unbiased prosecutor, although no cases were found squarely in

point on this question, it would seem that this must be so because it would not occur to fair-minded men that the rule should be otherwise. Many questions have been raised where special prosecutors or unqualified prosecutors were presenting cases to Grand Juries. (See Wharton's Criminal Law and Procedure, Vol. 4, Sec. 1716, pp. 478-486 inclusive.)

As appears from Appendix C and Appendix E the prosecutors both had at least apparent motives for being unfair, and a reading of the transcript demonstrates that they were in fact unfair.

The case of *James V. Giles v. State of Maryland,* 386 U.S. 66, 17 L. ed. 2d 737, 87 S. Ct. 793, although involving a conviction of rape after a trial was had, might shed some light on the concept petitioner is advancing in this petition. Although the Court did not agree on an Opinion in the *Giles* case (supra), the questions involved were similar to the one involved here, namely, was there a denial of due process by an unfair prosecutor. In the *Giles* case apparently the prosecutor suppressed evidence concerning the credibility of witnesses on the issue of consent. There was some claim that there was known use of perjured testimony by the prosecutor and applying the philosophy of this case to the instant case, it is submitted that the verified Petition for Habeas Corpus must, for purposes of issuing the Writ of Certiorari, be taken as true in the absence of any counter verified statements, and it is clear from a reading of Appendix C that a fair presentation at the Grand Jury level was not had.

It is submitted that due process requires a fairer presentation before a Grand Jury, since only one side is there represented, than would the presentation by a prosecutor at a trial of a case. An Indictment issued by a small-town Grand Jury with the attendant publicity and with a lawyer involved as a defendant means that whatever benefits may still exist in the presumption of innocence would be lost, and this fact, too, would require that extra care be given to see that a fair presentation is had before a Grand Jury which, in reality, is the last vestige of the Star-Chamber proceeding.

2. The net result of the rulings of the Nevada State Supreme Court, so far as the petitioner is concerned, is that he has not had a hearing before any Court on the constitutional issues for the reason that the same were not properly before the Supreme Court in the first instance, and when it was sought to bring them before the Trial Court by the use of the habeas corpus writ (Appendix C) the Supreme Court of Nevada precluded the use of this procedure. Although not a technical suspension of the Writ of Habeas Corpus in the sense that it was suspended for all citizens in Nevada, it was, so far as this petitioner is concerned, an effective suspension of the use of the Writ before any of the state trial courts and certainly of the State Supreme Court.

3. On the issue of sufficiency of the evidence, the Nevada court erred in not following the Nevada statutes as to the degree of proof. It is submitted that the Nevada statutes, N.R.S. 172.260(2) and 172.280,

when read together, require that there be legal evidence which is sufficient to meet the test of proof beyond a reasonable doubt where the evidence would stand unexplained and uncontradicted. There is no such evidence in the transcript of the hearing before the Grand Jury and it simply shows as to this petitioner that he acted as an attorney and as an officer of a corporation, but it shows absolutely no criminal activity of any sort on his part which would justify the finding of the Indictment.

4. With reference to N.R.S. 172.270 this statute confers upon a layman the right to withhold or grant a fair hearing. In this case, as will appear from the record, this petitioner sought to be heard before the Grand Jury on two occasions and was denied this right, as further appears from Appendix C attached hereto and Exhibits A and B attached thereto, and as appears from Appendix E.

A person proceeded against by complaint, preliminary examination and filing of an Information has a right to present evidence, to confront his accusers and to cross-examine the witnesses, all of these being elements of fair-play due process. To permit a statute to confer upon a layman to right to deny due process certainly must be violative of the Fourteenth, Fifth and Sixth Amendments of the United States Constitution. It presents an opportunity for two systems of criminal justice to exist in this country—one by secret indictment and the other by open public accusation. If we are to have equal justice under the law you cannot permit these two completely different

systems of criminal justice to exist with the discretion as to which system will be applied left to some appointed or elected public official or to a Grand Jury composed of laymen.

5. Under Nevada law the defendant was entitled to be tried within the sixty-day period, and the mere fact that he sought appropriate remedies to see that his case was fairly presented at the pre-trial level does not in and of itself constitute his causing the delay. The trial judge held the first habeas corpus proceedings under submission for a total of 120 days from the date of concluding argument to the date of decision, and this alone has deprived this petitioner of his right to a speedy trial.

The case of *Peter H. Klopfer v. State of North Carolina,* 386 U.S. 213, 18 L. ed 2d 1, 87 S. Ct. 988, holds that the Fourteenth Amendment includes the Sixth Amendment's guarantee of an accused's right to a speedy trial and, therefore, applies to the states. The delay in deciding this case at the Trial Court level is sufficient to have violated the petitioner's right to a speedy trial.

6. The contention that petitioner has once been placed in jeopardy in violation of the Fifth Amendment of the Constitution of the United States or should be released pursuant to Nevada statute, is based upon the concept that under N.R.S. 174.270 the trial judge should have directed the case, when he sustained the Demurrer in the first instance on the first Indictment, to be submitted to the same or another Grand Jury. As appears from Appendix C

under Third, Paragraphs II and III, the Court did not properly exercise this prerogative and instead apparently conferred the right of further proceedings upon the discretion of the Attorney General's Office of the State of Nevada. It is submitted that this was not a compliance with N.R.S. 174.270, and that under Section 174.280 the defendant should have been discharged. Perhaps constitutional double jeopardy per se is not involved, but certainly the concept of double jeopardy as reflected in the statute is involved and was violated.

CONCLUSION

It is believed that the question of whether or not a defendant, as a matter of constitutional due process, is entitled to a fair presentation before a Grand Jury is a question of first impression to this Honorable Court and is a question of tremendous importance and the Court should consider it. To refuse to do so leaves open a device whereby two systems of criminal justice can exist in the statutes and be enforced at the will of a prosecutor, be he honorable or dishonorable. It paves the way for a different treatment of our citizens in the field of criminal justice.

The other points involved are not unique but nevertheless are meritorious. A careful reading of the transcript before the Grand Jury and even of the contentions thus far made by the prosecution in this case fail to disclose any evidence to justify an Indictment on the charge of embezzlement and a reading of the entire record, considering the various points raised,

it is submitted will convince this Honorable Court that a grave injustice has been thus far perpetrated on the petitioner in this case.

Lastly, although the Grand Jury system has long been a portion of our law enforcement structure, its initial purpose was to protect the citizen against over-aggression on the part of government law enforcers. It is common knowledge that it no longer serves this purpose and has now been perverted to the position where it gives Star-Chamber criminal justice to those who are unfortunate enough to have this type of an accusation levied against them because a prosecutor desires to handle the matter in this way.

The Petition for Writ of Certiorari should be granted.

Dated, Reno, Nevada,
January 22, 1968.

Respectfully submitted,
VARGAS, BARTLETT & DIXON,
BRIAN L. HALL,
By BRIAN L. HALL,
Attorneys for Petitioner.

(Appendices A, B, C, D and E Follow)

Appendix A

In the Supreme Court of the State of Nevada

Nos. 5363 and 5364

The State of Nevada,	Appellant,
vs.	
W. Mark Eddington and J. MacArthur Wright,	Respondents.

Appeal from orders of the Second Judicial District Court, Washoe County, granting writs of habeas corpus;

John W. Barrett, Judge.

The order in Case No. 5363 is affirmed, and the order in Case No. 5364 is reversed.

Harvey Dickerson, Attorney General; Daniel R. Walsh, Deputy Attorney General; Carl F. Martillaro, Special Deputy Attorney General, of Carson City, for Appellant.

Morse and Graves, of Las Vegas, and Robert W. Hughes, of Salt Lake City, Utah, for Respondent W. Mark Eddington

Vargas, Dillon; Bartlett and Dixon, of Reno, for Respondent J. MacArthur Wright.

OPINION

By the Court, Thompson, C.J.:

The issue presented by this consolidated appeal is the legal sufficiency of the evidence upon which a grand jury acted in returning two indictments charging embezzlement. One (Case No. 5363) alleged that Eddington and Frisby embezzled $100,000 from the People's Investment Company. The other (Case No. 5364) charges that Eddington, Wright, and Frisby embezzled $200,000 from the Mark Twain Life Insurance Company. Eddington and Wright challenged the sufficiency of the evidence through petitions for habeas corpus. Shelby v. District Court, 82 Nev. 204, 414 P.2d 942 (1966). Frisby did not interpose a challenge. The district court ruled that the evidence was not sufficient to warrant holding either defendant for trial and discharged each pursuant to his application for habeas corpus. We affirm that ruling in Case No. 5363, but reverse in Case No. 5364.

The quality and persuasive force of evidence needed to support an indictment are expressed by NRS 172.260(2) and NRS 172.280. The first commands that "none but legal evidence, * * * to the exclusion of hearsay or secondary evidence," shall be received. The second suggests that grand jurors should indict "when all the evidence before them, taken together, is such as, in their judgment, would, if unexplained and uncontradicted, warrant a conviction by the trial jury."

It is not useful to relate the mass of legal evidence presented to the grand jury. In the Mark Twain case there was ample to justify a belief that, absent ex-

planation or contradiction, a trial jury could lawfully convict the defendants. Accordingly, we shall recite only an abbreviated version of the record simply to show that statutory standards were met. As to the People's Investment matter we shall briefly note wherein the showing was deficient.

People's and Mark Twain are domestic corporations. Each was chartered in 1963. The aim of Mark Twain was to qualify and do business as a stock life insurance company. People's was organized to conduct the sale of shares of stock in Mark Twain. In October, 1963 the two companies made an agreement giving People's authority to manage Mark Twain during the sale of the common stock to be offered by Mark Twain. Eddington was the vice-president and a director of Mark Twain, and the president and a director of People's. Wright was the secretary-treasurer, resident agent, director, and counsel for Mark Twain, and counsel for People's. Frisby was the president and a director of Mark Twain, and the secretary-treasurer and director of People's. Eddington and Frisby were a majority of the Board of Directors of People's and, with Wright, composed the "executive committee" of Mark Twain.

Enough of the common stock of Mark Twain was sold by October, 1964 to cause the State to issue Mark Twain a license to do business as a stock life insurance company. The function of People's under the stock sales agreement had been discharged. A majority of the Board of Mark Twain believed that People's had ceased all operations.

Mark Twain commenced selling insurance in January, 1965. From then through September, 1965, more than $200,000 left its treasury without authority from the Board of Directors. Most of that amount was paid out as "insurance commissions" to People's ($107,000), and to Eddington ($34,421.22) and Frisby ($32,000), individually. The charter of People's did not grant it authority to solicit or sell insurance, nor was an agent's license issued to it for that purpose. Although the minutes of Mark Twain ambiguously reflect that its "executive committee" (Eddington, Wright, and Frisby) had approved an arrangement with People's, and with Eddington and Frisby individually, to sell Mark Twain insurance on a commission basis, the majority of the Board of Directors of Mark Twain assert that such arrangement was never presented to them for consideration and approval, and that the minutes prepared by Wright so indicating, are false. In any event, the record shows that the sums expended by Mark Twain for "insurance commissions" substantially exceeded the percentages authorized by the executive committee, assuming its authority to act for Mark Twain. The record also shows payments totalling $15,000 to Wright as counsel fees, and almost $43,000 in "travel expense," each without approval of the Board. Indeed, the majority of the Board was kept in the dark about these expenditures. When they inquired, the members of the executive committee would engage in a filibuster and refuse to respond candidly. Even physical violence was threatened. The stability of Mark Twain deteriorated and the company was placed in receivership.

These facts justify the belief held by the grand jury that substantial funds of Mark Twain were fraudulently appropriated by Eddington, Frisby, and Wright. The elements of embezzlement [NRS 205.300] are present. A fiduciary relationship existed between Mark Twain and those charged with defalcations. Cf. Carter v. State, 79 Nev. 89, 378 P.2d 876 (1963). Money was used for purposes other than those for which entrusted, thus permitting an inference of fraudulent intent. State v. Trolson, 21 Nev. 419, 32 P. 930 (1893). A prima facie case was made. Whether it will persuade at trial where the defendants will be present with counsel, and afforded an opportunity to explain their conduct, is another matter, wholly irrelevant to the issue at hand.

Although Eddington and Wright suggest that the grand jury should have heard from them before returning indictments, the grand jury was not required to do so. NRS 172.270. Indeed, had they been granted an audience, the grand jury would not have been required to accept their explanations, but could indict notwithstanding them. In this respect the grand jury function is not unlike that of the justice of the peace upon a preliminary examination. [See State v. Fuchs, 78 Nev. 63, 368 P.2d 869 (1962), where we held that the evidence at the preliminary hearing was sufficient to justify holding the accused to answer in the district court, notwithstanding her written exculpatory statement received in evidence.]

The indictment charging embezzlement from People's Investment is not supported by sufficient evidence

to warrant trial. Although the record reflects substantial expenditures without explanation, there is nothing to show that the expenditures were unauthorized. Of course, the money flow from Mark Twain to People's and out, may well be competent evidence at the trial of the Mark Twain case.

Other contentions respecting the two indictments have been considered and are without substance. The order of the district court granting habeas corpus in the Mark Twain Case No. 5364 is reversed, and the cause remanded to the district court for trial. The order granting habeas corpus in the People's Investment Case No. 5363 is affirmed.

Thompson, C.J.

We concur:
Collins, J.
Zenoff, J.

Filed September 25, 1967,
C. R. Davenport, Clerk.

Appendix B

In the Supreme Court of the State of Nevada

No. 5464

State of Nevada,
Petitioner,
vs.
Second Judicial District Court, State of Nevada, for the County of Washoe, the Honorable Thomas O. Craven, a District Judge thereof,
Respondent.

PERMANENT WRIT OF PROHIBITION

The State of Nevada to the Second Judicial District Court and the Honorable Thomas O. Craven, District Judge thereof, greetings:

Whereas, Harvey Dickerson, Attorney General of the State of Nevada, by and through Daniel R. Walsh, Chief Deputy Attorney General, Carl F. Martillaro, Special Deputy Attorney General, and John A. Porter, Deputy Attorney General, did, in our Supreme Court of the State of Nevada, present facts by verified petition that the Second Judicial District Court, Honorable Thomas O. Craven, Judge thereof, is about to hold hearings and decide matters already determined by this Court, and is exceeding the jurisdiction of said

court in doing so unless restrained and prohibited from doing so; and

Whereas, the Supreme Court of the State of Nevada did on the 8th day of November, 1967, hold a hearing in chambers on this matter, with the following counsel present: John C. Renshaw of Vargas, Bartlett and Dixon, attorneys for J. MacArthur Wright; Madison B. Graves, Esq., attorney for W. Mark Eddington; J. Rayner Kjeldsen, Esq., attorney for C. Larry Frisby; Daniel R. Walsh, Carl F. Martillaro, and John A. Porter; and

Whereas, it has been determined by this Court that the matters presented by the petition for writ of habeas corpus filed by J. MacArthur Wright and petition for writ of habeas corpus filed by W. Mark Eddington, joined in by defendant C. Larry Frisby, and the matters presented by a petition for stay filed by defendant W. Mark Eddington, have been previously presented to this Court and found to be without merit or substance; and

Whereas, the District Court is without jurisdiction to reconsider these matters previously disposed of by this Court,

It Is Hereby Ordered that the Second Judicial District Court, Honorable Thomas O. Craven, Judge thereof, be and is hereby prohibited, enjoined and restrained from considering or acting further on the petitions for habeas corpus presented by defendants J. MacArthur Wright, W. Mark Eddington and C. Larry Frisby and assigned Washoe County Civil Nos. 240497 and 240498.

It Is Further Ordered that the said Court and Judge be prohibited, enjoined and restrained from considering or acting further on a petition for stay filed by defendant W. Mark Eddington in Washoe County Criminal Case No. 233307.

It Is Further Ordered that the described petitions for habeas corpus and stay be and they hereby are dismissed.

It Is Further Ordered that counsel for each of the defendants notify this Court in writing by November 15, 1967, whether each and every defendant will or will not waive the sixty day rule for trial on the merits.

Done at Carson City, Nevada, this 8th day of November, 1967.

/s/ Thompson
Gordon Thompson, Chief Justice

/s/ Collins
Jon Collins, Justice

/s/ Zenoff
David Zenoff, Justice

Filed November 8, 1967,
C. R. Davenport, Clerk.

Appendix C

No. 233307 Dept. No. 2

In the Second Judicial District Court
of the State of Nevada
in and for the County of Washoe

In the Matter of the Application
of
J. MacArthur Wright for a Writ of
Habeas Corpus.

PETITION FOR WRIT OF HABEAS CORPUS

To the Honorable John W. Barrett, Judge of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, Department No. 2 thereof:

Comes Now, J. MacArthur Wright, acting by and through his counsel, Vargas, Bartlett & Dixon, John C. Bartlett, Esq. appearing and making this request, and petitions the above entitled Court for the issuance of a Writ of Habeas Corpus and as grounds therefor states:

First

I.

That he, the said J. MacArthur Wright, is unlawfully restrained of his liberty by C. W. Young, Sheriff

of Washoe County, State of Nevada; that said restraint consists in this, that the said J. MacArthur Wright has been required to appear before the above entitled Court and is currently released by said Court on his own recognizance, but with the requirement that he appear before the Court to plead to the Indictment pending against him on a charge of embezzlement.

II.

That the said restraint of liberty is illegal and that the illegality thereof consists in this, to wit:

1. That said Indictment charges petitioner with the crime of embezzlement, a violation of Section 205.300 Nevada Revised Statutes; that said Indictment was found on the 29th day of November, 1966, by the same Grand Jury which had found the previous Indictment against J. MacArthur Wright on the 11th day of August, 1966, to which a demurrer had been sustained before this Court; that no new testimony was taken before the Grand Jury which issued the Indictment here in question, but rather relied solely upon the testimony taken before it for its Indictment of August 11, 1966.

That at the time of the Grand Jury hearing which resulted in the Indictment dated August 11, 1966, this Petitioner requested by telephone call to Carl Martillaro, one of the prosecutors who was presenting the case to the Grand Jury, and William Raggio, the District Attorney of Washoe County, that he be permitted to appear before the Grand Jury then in session, and to explain his position in the matter and

to explain evidence which was being presented to them. That also, at the same time, this petitioner sent a telegram to the foreman of the Grand Jury requesting the right to be heard.

That at the time of the Grand Jury session, out of which the present Indictment was found Petitioner, acting by and through his counsel, John C. Bartlett, sent letters to the foreman of the Washoe County Grand Jury requesting the right to appear and be heard, copies of which letters are marked Exhibit A, annexed hereto and by reference made a part hereof.

That Section 172.270, Nevada Revised Statutes, provides as follows:

> "Grand jury not bound to hear evidence for defendant, but may order production of explanatory evidence; issuance of process for witnesses. The grand jury is not bound to hear evidence for the defendant. It is their duty, however, to weigh all evidence submitted to them, and when they have reason to believe that other evidence within their reach will explain away the charge, they must order such evidence to be produced, and for that purpose may require the district attorney to issue process for the witnesses."

That acting pursuant to said statute, the Grand Jury refused, on both occasions, to permit Petitioner to appear before them and be heard. That such denial constitutes a denial of due process, a denial of equal protection under law, and the statute authorizing the Grand Jury to refuse a defendant the right to be heard is unconstitutional, and violative of the

Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States of America.

Second

That the Petitioner was deprived of his constitutional rights to due process and to equal protection under the law, guaranteed him by the Fifth, Sixth and Fourteenth Amendments of the United States of America Constitution in this, that the presentation of evidence to the Grand Jury was done in a biased manner and evidence known to the prosecution was withheld from the Grand Jury. The instances of this type of conduct are as follows:

A. Prosecutor Daniel Walsh had a personal bias arising in part at least, from the fact that he had acted as the attorney for Louis Mastos, Insurance Commissioner of the State of Nevada, in a civil proceeding wherein the defendants which were indicted by this Grand Jury were on the other side of the case from him.

B. That Daniel Walsh had a personal bias because several months prior to the hearing before the Grand Jury, in the presence of Petitioner, Adam Duncan, one of the people indicted by the Grand Jury, who was associate counsel with Petitioner herein on the other side of the case, stated to Daniel Walsh, "I've never seen anyone so unconcerned with due process or constitutional rights", and Daniel Walsh replied, "It's none of the your business." Duncan said, "You son-of-a-bitch", and Walsh stated, "You'll live to regret this."

C. That Carl Martillaro was the owner of stock in the Mark Twain Life Insurance Company at the time he was representing the prosecution.

D. That in a previous proceeding Petitioner, who is a duly licensed practicing attorney in the State of Nevada had, in a proceeding before the Supreme Court of the State of Nevada, accused the said Carl Martillaro of attempting to deceive the Supreme Court by quoting from a part of a case only, and on information and belief Petitioner states that Carl Martillaro had a personal bias against him for this reason.

E. That the transcript before the Grand Jury of Washoe County, gives evidence of the bias of these two prosecutors in this, that they admonished witnesses who were favorable to the prosecution in one manner, and permitted these same witnesses to indulge in hearsay statements without admonition. By contrast, as to witnesses who might be favorable to the defendant's views of the case, they were admonished in a different manner and on at least one occasion, a witness favorable to defendant's case was advised that hearsay would not be permitted.

F. That these prosecutors discussed the case with the Grand Jury off the record so that, and on information and belief, this Petitioner would state what was said then was highly prejudicial to the rights of this Petitioner and in any event, Petitioner was deprived of his constitutional rights to due process by having unrecorded discussions take place between the prosecution and the Grand Jury.

G. That nowhere in the record or transcript before the Grand Jury does it appear that the Grand Jury was ever advised at the time of the initial hearing, that this Petitioner desired to be heard.

H. That the prosecutors concealed evidence from the Grand Jury in the following respects:

1. Although they knew the witness Norris had been convicted of the crime of embezzlement, they did not bring this fact before the Grand Jury.

2. Although Carl Martillaro knew that as to a $10,000 fee received by Petitioner's law firm, that the same was reinvested immediately in the common stock of the corporation, this fact was concealed from the Grand Jury and the Grand Jury could well have inferred that Petitioner in fact got $10,000 worth of stock and $10,000 in cash. Petitioner had explained this entire matter to Carl Martillaro before the Grand Jury hearing, and Carl Martillaro concealed the true picture from the Grand Jury and on information and belief Petitioner would state that this biased the Grand Jury against him.

3. That the prosecutors had in their possession the stock records of Peoples Investment Company showing that Petitioner had no stock in this company. Nevertheless, and for the deliberate purpose of prejudicing the rights of Petitioner, prosecutors presented Hale Bennett, who testified that Petitioner owned one-third interest in Peoples Investment Company and furthermore, Mr. Bennett was allowed to testify to immaterial matters concerning a banking venture, which were prejudicial to this Petitioner and the said

Hale Bennett was the first witness presented by the prosecution which, as a trial tactic, prejudiced the rights of this Petitioner.

4. That prosecutor Daniel Walsh had discussed the matters testified to by Hale Bennett with other people who were thoroughly familiar with these matters and the statements to Daniel Walsh were favorable to the position of Petitioner and Daniel Walsh then concealed from the Grand Jury the testimony of these witnesses.

5. That one of the Grand Jurors, Mary Manker, was at the time of the Grand Jury hearing, a stockholder in the Mark Twain Life Insurance Company and on information and belief had, as a stockholder, received communications from the Attorney General's office when the Attorney General's office was acting as counsel in a receivership hearing prior to the hearing before the Grand Jury. The contents of these communications were highly prejudicial to the rights of the Petitioner. The prosecution either knew, or should have known since they had the corporate records, that Mary Manker was a stockholder.

I. That there was a great deal of pre-indictment publicity participated in part at least by Daniel Walsh, one of the prosecutors, which publicity was highly prejudicial to the rights of the defendants, including this petitioner. Petitioner proposes, at the time of the hearing on this matter, to introduce as evidence various newspaper exhibits in support of this contention.

J. That as further evidence of the bias of the prosecutors, when C. Larry Frisby, one of the defendants, represented to the Court that he was without funds and requested of the Court to appoint counsel to represent him, both of the prosecutors, to-wit: Daniel Walsh and Carl Martillaro, appeared in open court on December 28, 1966, and opposed the appointment of an attorney. At that hearing, prosecutor Carl Martillaro undertook an extensive examination into the financial status, the business plans of the defendant, and even went so far as to inquire as to how much money the defendant had earned during the period of time that he was employed by the Mark Twain Life Insurance Company. When told, they asked if he did not receive a greater sum, which question could only have been asked for the purpose of inferring to the Court that the defendant had received more money than he declared, and therefore would be guilty of embezzlement, of which he is charged.

Third.

I.

That further prosecution is barred by the statutes of Nevada.

In connection with the foregoing contention, the original indictment is identical with the present indictment, except as to date and the fact that the original indictment was called Count I, and the present indictment has no count. The Court sustained a demurrer to the original indictment on the grounds of improper joinder in this, that more than one offense

was charged. The ruling was made pursuant to Section 174.230 Nevada Revised Statutes.

II.

At the time of so ruling, the trial court, pursuant to Nevada Revised Statutes, Section 174.270, stated, "I direct that the case be submitted to the same or another grand jury or that an information be filed".

Further in its decision, the Court went on to state, "Now I think some latitude must be allowed with regard to discretion to be exercised by the Attorney General in this case, and I feel if the Attorney General desires to continue to proceed in this matter that it can be done by either presentation to the grand jury, the present one or another one, or through the filing of a criminal complaint, preliminary hearing, or information. Of course, there is another way by filing an information upon affidavit, and I suppose that can be done, too."

Later in the decision, the Court stated, "Mr. Bartlett, I am not sure the Court has the power to tell a prosecuting attorney how, when and why he will proceed. They may even decide not to bring this back here. I don't think I can tell the representatives of the Attorney General they can or cannot do this or anything else. I am inclined to agree with Mr. Martillaro that they go ahead and do what is going to be done. Then, if there is something wrong, you can complain".

And finally the Court stated, "I will tell you what the ruling will be right now. I have given the State

thirty days within which to proceed or not proceed. If the State doesn't proceed, that is the end of the problem".

III.

It is the contention of this Petitioner that the Court in so ruling did not correctly follow the statute, Nevada Revised Statutes 174.270, which provides as follows:

> "Allowance of demurrer bar to another prosecution; exceptions.
>
> "1. If the demurrer is allowed, the judgment is final upon the indictment or information demurred to and is a bar to another prosecution for the same offense, unless the court, being of the opinion that the objection on which the demurrer is allowed may be avoided in a new indictment or information, directs the case to be submitted to the same or another grand jury, or directs a new information to be filed.
>
> "2. After such order or resubmission the defendant may be examined before a magistrate and discharged or committed by him, as in other cases."

and that the Court further delegated its judicial powers to the Attorney General's office improperly, so that the case was not in fact, submitted to the same or another grand jury.

IV.

Nevada Revised Statutes 174.280, provides as follows:

"Discharge of defendant; exoneration of bail or return of deposit when amendment not permitted.

"If the court does not permit the information to be amended nor direct that an information be filed or that the case be resubmitted, as provided in NRS 174.270, the defendant, if in custody, must be discharged, or if admitted to bail his bail is exonerated, or if he has deposited money instead of bail the money must be refunded to him."

As appears from the foregoing statute, if the case is not ordered to be resubmitted as provided in NRS 174.270, the defendant must be discharged.

If there be any doubt as to how the Court's ruling was understood by the prosecution, petitioner here points out the following conduct of the prosecution after the Court's ruling:

1. The prosecution got an extension of time within which to resubmit Count III of the original Indictment or otherwise proceed against the defendant, W. Mark Eddington.

2. That in fact the prosecution did not resubmit such Count to the Grand Jury, or otherwise proceed against W. Mark Eddington, so that if it had been directed by the Court to do so the prosecution would be in violation of the Court's order.

3. This conduct on the part of the prosecution clearly shows that in their judgment the discretion as to whether or not this case would be resubmitted to the same, or another, Grand Jury, or otherwise proceeded against, was vested entirely with them and not with the Court.

Wherefore, your Petitioner prays as follows:

1. That a writ of Habeas Corpus be granted, directed to the said C. W. Young, Sheriff of Washoe County as aforesaid, commanding him to have the body of the said J. MacArthur Wright before this Honorable Court at a time and place therein to be specified, to do and receive what shall then and there be considered by this Court, concerning said J. MacArthur Wright, together with the time and cause of his restraint, and said Writ; and that he, the said J. MacArthur Wright, may be restored to his liberty and an order be entered directing the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, to dismiss the Indictment pending against him.

2. That on the hearing on this Writ of Habeas Corpus, the Court require the attendance of witnesses by process of subpoena, and do all other things necessary for a full and fair hearing and determination of this case, or as provided in Nevada Revised Statutes 34.470.

Dated this 23rd day of October, 1967.

Vargas, Bartlett & Dixon
By John C. Bartlett
Attorneys for Petitioner
195 South Sierra Street
Reno, Nevada

State of Nevada
County of Washoe—ss.

J. MacArthur Wright, being first duly sworn, deposes and says:

That he has read the foregoing Petition for Writ of Habeas Corpus and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters he believes it to be true.

J. MacArthur Wright

Subscribed and sworn to before me
this 23rd day of October, 1967.
Barbara Reimers
Notary Public
State of Nevada
Washoe County
My Commission Expires June 20, 1968

"EXHIBIT A"

November 18, 1966

Mr. Stephen A. Drew
964 - 5th Street
Sparks, Nevada

Dear Mr. Drew:

As you know, this office represented J. MacArthur Wright in the defense of the Indictment which was found by the Grand Jury on August 11, 1966 against him, Mr. Frisby and Mr. Eddington.

District Judge John W. Barrett has sustained a Demurrer to the Indictment and given the prosecution thirty (30) days within which to re-submit the matter to your Grand Jury or to file an Information on affidavit or to file a criminal complaint and bring the matter up through the Justice Court preliminary hearing method of accusing a person of a crime.

In the event the prosecution, which I believe to be the Attorney General's Office of this State, should seek to re-submit the matter to your Grand Jury we urge upon you, in the interest of justice and fair-play, that J. MacArthur Wright, our client, Mr. Renshaw and myself be allowed to appear before you to explain our views of the facts presented and to have Mr. Wright answer any questions that you or any member of the Grand Jury wants to put to him. We would hope this request would be granted even though, as you know, the Grand Jury is not bound to hear this evidence.

Since all of us seeking to appear before you have rather busy trial calendars, we would appreciate getting as much notice as possible of the time and place of any such hearing.

Any consideration you can give to my office and my client in this matter will be greatly appreciated.

Yours very sincerely,

John C. Bartlett

JCB/g

"EXHIBIT B"

November 28, 1966

Mr. Stephen A. Drew
964 - 5th Street
Sparks, Nevada

Dear Mr. Drew:

I am now advised you are going to consider the Mark Twain Indictments on Tuesday, November 29, 1966, and it was suggested to me that the Attorney General's Office was going to take the position that you do not have the right to take further evidence on this matter, but must consider it solely on the evidence previously presented to you.

I feel certain this is not the law and that the choice of whether to take other evidence is entirely yours. My opinion is based upon considerable research done over the weekend and the good sense of the situation. As always I could be in error on this, but I would appreciate it if you would not take either my interpretation of the law or the Attorney General's interpretation if he believes you cannot receive further evidence, but rather consult with the District Attorney's Office who I believe by statute are your counsel, or if you get the approval of the County Commissioners you could engage your own counsel to advise you.

Even if I am in error on the law regarding evidence, I still request the right to appear before you. As an attorney having had approximately six years experi-

ence in the District Attorney's Office of Washoe County and twenty-nine years of practice, with time out for being in the service, I feel with the evidence before you I could demonstrate to you rather clearly that a re-indictment would be wrong, and I would hope there would be many questions that would be in your mind and the minds of the other Grand Jurors that I could answer for you.

It is my understanding that the Grand Jury is the sole judge as to who can be allowed to appear before them. Nevada Revised Statutes Section 172.320 (3) provides as follows:

> "Except the District Attorney and such other persons as the Grand Jury may require to be present, no person shall be permitted to be present before the Grand Jury besides the witness actually under examination . . . ".

Of course no person can be present when you are voting and the question of whether you would want me present when my client is testifying would be entirely up to you since he and I are both willing that he appear either with or without counsel.

Your consideration, and that of the other members of the Grand Jury will, of course, be appreciated by my client and by me.

Yours very sincerely,
John C. Bartlett

JCB/g

Filed October 23, 1967,
H. K. Brown, Clerk.

Appendix D

Western Union Telegram

1967 NOV 6 PM 3 56

353P PST NOV 6 67 PRB173
PR CYA036 RX PD CARSON CITY NEV 6 337P PDT

VARGAS, BARTLETT AND DIXON: ATTN JOHN BARTLETT ESQ
195 SOUTH SIERRA ST RENO NEV

THE STATE IS GOING TO SEEK A WRIT OF PROHIBITION AGAINST THE SECOND JUDICIAL DISTRICT COURT, PROHIBITING IT FROM PROCEEDING FURTHER ON THE WRITS FILED AND JOINED IN BY THE DEFENDANTS IN THE MARK TWAIN CASE. PLEASE APPEAR BEFORE THE NEVADA SUPREME COURT AT 10AM WEDNESDAY NOVEMBER 8, 1967, AT WHICH TIME THE STATE WILL SEEK ITS ALTERNATIVE WRIT

HARVEY DICKERSON ATTORNEY GENERAL

10AM 8 1967
(54).

Appendix E

Telegram Received by Telephone—Confirmation

DESTINATION RENO NEV

SALT LAKE CITY UTAH AUG 11

STEPHEN DREW, PERSONAL DELIVERY ONLY

FOREMAN GRAND JURY WASHOE COUNTY WASHOE COUNTY COURTHOUSE

MR DREW, I AM HEREBY REQUESTING THE OPPORTUNITY TO APPEAR BEFORE THE WASHOE COUNTY GRAND JURY AS I HAVE EVIDENCE AND TESTIMONY WHICH I CONSIDER TO BE PERTINENT AND EXTREMLY IMPORTANT TO A KNOWLEDGEABLE DETERMINATION ON THE PART OF THE WASHOE COUNTY GRAND JURY CONCERNING MATTERS REPORTED TO BE UNDER CONSIDERATION BY IT. CAN BE IN RENO BY PLANE WITHIN TWO OR THREE HOURS IF YOU WILL GIVE ME THE OPPORTUNITY TO SO PRESENT MYSELF.

(signature) J MAC ARTHUR WRIGHT
1155 EAST 5TH SOUTH
SALT LAKE CITY
UTAH APT 6
CFN FURN

(sub.) JOHN W WRIGHT

(SAME MSG SENT TO MR DREW CARE DISTRICT ATTORNEYS OFFICE)

LIBRARY
SUPREME COURT, U. S.

Office Supreme Ct.
FEB 24

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1967

NO. 1066

SECOND JUDICIAL DISTRICT COURT, STATE OF NEVADA, FOR THE COUNTY OF WASHOE, THE HONORABLE THOMAS O. CRAVEN, A DISTRICT JUDGE THEREOF, (J. MACARTHUR WRIGHT, REAL PARTY IN INTEREST), *Petitioner,*

vs.

THE STATE OF NEVADA, *Respondent.*

MEMORANDUM FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

HARVEY DICKERSON
Attorney General of Nevada
Supreme Court Building
Carson City, Nevada 89701
Attorney for Respondent.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1967

NO. 1066

SECOND JUDICIAL DISTRICT COURT, STATE OF NEVADA, FOR THE COUNTY OF WASHOE, THE HONORABLE THOMAS O. CRAVEN, A DISTRICT JUDGE THEREOF, (J. MACARTHUR WRIGHT, REAL PARTY IN INTEREST), *Petitioner,*

vs.

THE STATE OF NEVADA, *Respondent.*

MEMORANDUM FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

HARVEY DICKERSON
Attorney General of Nevada
Supreme Court Building
Carson City, Nevada 89701

Attorney for Respondent.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1967

NO. 1066

SECOND JUDICIAL DISTRICT COURT, STATE OF NEVADA, FOR THE COUNTY OF WASHOE, THE HONORABLE THOMAS O. CRAVEN, A DISTRICT JUDGE THEREOF, (J. MACARTHUR WRIGHT, REAL PARTY IN INTEREST), *Petitioner*,

vs.

THE STATE OF NEVADA, *Respondent*.

MEMORANDUM FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

NEVADA SUPREME COURT'S OPINION ON APPLICATION FOR WRIT OF HABEAS CORPUS

On November 8, 1967, the Nevada Supreme Court issued and entered a writ prohibiting the state district court from hearing

a second petition for writ of habeas corpus filed by petitioner before trial. This writ is attached as Appendix B of petition. The reason for its issuance was to prohibit the district court from hearing identical matters presented to the state supreme court, which decided on September 25, 1967, that the contentions were without merit or substance. Appendix A of petition.

JURISDICTION

We respectfully submit that petitioner has failed to show that this court has jurisdiction of this case, for the following reasons:

I.

1. The issues raised in the above-entitled cause were argued and submitted to the Nevada Supreme Court, and an opinion was rendered and judgment entered on September 25, 1967, by that court. *State of Nevada v. W. Mark Eddington and J. MacArthur Wright*, 432 P.2d 87, and attached as Appendix A to petition.

2. The petitioner is apparently seeking certiorari from a permanent writ of prohibition issued by the Nevada Supreme Court on November 8, 1967, and attached as Appendix B to the petition. That court prohibited the state district court from hearing a second petition for writ of habeas corpus filed by Mr. Wright because the matters alleged had been previously presented to the Nevada Supreme Court and found to be without merit or substance by its September 25, 1967, decision.*

3. The issues raised in the present petition disclose that petitioner is actually seeking certiorari from the September 25, 1967,

---

*The petition for certiorari in this case was captioned J. MacArthur Wright, Petitioner, v. The State of Nevada, Respondent, and changed to the present caption by order of the Clerk of the United States Supreme Court.

decision of the Nevada Supreme Court. This is an improper attempt to do indirectly that which petitioner is precluded from doing directly because of time limitations.

4. The petition was filed January 30, 1968, more than ninety days since the entry of judgment by the Nevada Supreme Court on September 25, 1967. The period for applying for a writ of certiorari has not been extended by a Justice of this court (Rule 22(1) of this court).

II.

The petitioner has failed to comply with Rule 23(f) of this court. Among other matters, he has failed to specify the state of the proceeding in the state court. The state is still attempting to get to trial to have the guilt or innocence of the defendants determined in a court of law. To this extent we do not have a final judgment, as the matter is not concluded. The jurisdictional requirement of finality does not appear to be present.

III.

If it is not clear from the record whether the state supreme court has decided a federal question by its decision, September 25, 1967, Appendix A to petition, the petitioner has failed to acquire a certificate from the state court that question was raised and decided. The following is found in Stern and Gressman, Supreme Court Practice, pp. 102, 103 (1962 Ed.):

> "As has been noted, it is essential to the exercise of the Supreme Court's jurisdiction under § 1257 that a substantial federal question be raised before the highest state court. If the federal question was explicitly decided, the Supreme Court assumes that it was properly raised. But if the question was ignored by the highest state court, the litigant is

then called upon to demonstrate that the question was properly and timely raised.

"It may not always be clear from the record that the federal question was raised before the highest state court or necessarily decided by it. The practice has therefore developed in doubtful cases of obtaining a certificate from the highest state court to the effect that a federal question was raised and decided. * * *"

QUESTION PRESENTED

The respondent contends that because of untimely filing, the only question presented by this petition is whether a state supreme court, by use of a writ of prohibition, may effectively suspend the use of a writ of habeas corpus when the petition for writ of habeas corpus is employed in the manner disclosed in this case. However, we will respond in our argument to all of petitioner's contentions.

STATEMENT OF THE CASE

On October 23, 1967, petitioner filed the petition for habeas corpus attached to petition as Appendix C. On November 8, 1967, the Nevada Supreme Court issued a permanent writ prohibiting the state district court from considering or acting on this petition. Appendix B of petition. The Nevada Supreme Court recited in this writ of prohibition that it had determined that the matters presented by the petition for writ of habeas corpus (attached to the petition herein as Appendix C) had been previously presented to the Nevada Supreme Court and found to be without merit or substance. See Exhibit A of petition. Petitioner now seeks certiorari of the November 8, 1967, writ of prohibition, and seeks to raise issues determined by the Nevada Supreme Court in its decision of September 15, 1967, whereby it remanded the case back for trial. The case is pending trial.

ARGUMENT

Response to Petitioner's Questions 1 and 2

Petitioner contends the prosecutors were prejudiced against the defendants; that they conducted themselves in an improper manner before the grand jury and introduced improper evidence. The Supreme Court of the State of Nevada, by unanimous decision, determined, after study of the transcript, that these contentions were without merit or substance. Appendix A and B to petition. The allegations are made through an exculpatory ex parte affidavit. Appendix C to petition.

If the defendants had succeeded in their attempts to hold a hearing in the state district court on these allegations, they would have effectively been allowed to try the prosecutors before they went to trial themselves. The state, by the nature of the allegations, had been placed on the defensive and the defendants, through this and other similar tactics, have been able to avoid trial to date. To a great extent, the due administration of criminal justice has been delayed by these legal maneuvers of the defendants. Even if the allegations were true, which we strenuously deny, and the Supreme Court of Nevada found to be untrue, a constitutional issue has not been raised. If it were the law that a criminal defendant could be denied due process as contended, we could envision a situation wherein every prosecutor in every criminal case could be placed in a position of defending his integrity and motives at a hearing set for that purpose prior to trial, and resulting from allegations made by a criminal defendant, whether they be true or false.

Although difficult to understand, this is exactly the position into which the state was placed after the Supreme Court of Nevada had ruled, adversely to the defendants, on a previous writ of habeas corpus presenting the same issues. The defendants

have presented no law applicable to their argument. There is none. *Giles v. Maryland*, 386 U.S. 66, 17 L.Ed.2d 737, 87 S.Ct. 793, concerned a prosecutor who suppressed evidence at trial that may have exonerated the defendant. We have not been to trial in the instant case, and if we knowingly suppressed evidence of innocence, we not only should be reversed, but disciplined. In regard to the present allegation, we can only state that we do not have any evidence that would prove the innocence of the defendants of the crime charged, nor did we present any false evidence to the grand jury to our knowledge then or now.

The Nevada Supreme Court may and did suspend the use of a writ of habeas corpus in proceedings involving a second and successive petition raising the same questions previously presented and determined.

> "Nothing in traditions of habeas corpus requires federal courts to tolerate needless piecemeal litigation, or entertain collateral proceedings whose only purpose is to vex, harass, or delay." *LeClair v. U.S.*, 241 F.Supp. 819 (D.C. Ind. 1965)
>
> "Second and successive petition for writ of habeas corpus need not be entertained unless it raises questions not previously presented and determined." *Walker v. Taylor*, 338 F.2d 945 (C.A. Kan. 1964)
>
> "Where petition for writ of habeas corpus is repetitious of previous petitions it should be dismissed." *Com. ex rel. Huber v. Myers*, 146 A.2d 666.

Response to Petitioner's Question 3

The Supreme Court of Nevada has determined that there was a mass of legal evidence presented to the grand jury in this case to sustain the indictment and, in fact, enough to justify a belief that, absent explanation or contradiction, a trial jury could lawfully convict the defendants. Appendix A to petition. The

defendants in this case have been accorded privileges beyond those established as constitutional rights by this court.

It is now settled by the decision of the United States Supreme Court in *Costello v. United States* (1956), 350 U.S. 359, 100 L.Ed. 397, 76 S.Ct. 406, that an indictment is not open to challenge in a federal court on the ground that it is based solely upon incompetent evidence. The actual holding was that an indictment cannot be challenged on the ground that only hearsay evidence was presented to the grand jury. The Court observed that "if indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed"; that "the result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury."

The defendants have had a preliminary trial on the competency and adequacy of the evidence before the grand jury, plus a state supreme court ruling on the issue. They have sought, and continue to seek by this petition, other preliminary trials on issues already disposed of.

Nevada evidentiary requirements and this record disclose that the defendants have been accorded rights completely beyond those necessary under federal law. Perhaps even to the extent of permitting the state to be substantially hindered in its attempt to fulfill obligations imposed upon it by law.

Under federal law the question generally could not be reached until after trial. A grand jury transcript is allowed to a defendant only where there is a compelling need for such disclosure and the disclosure is required by the ends of justice.

In Nevada, a criminal defendant is allowed a copy of the transcript as a matter of course. *Shelby v. Sixth Judicial District*

Court, 82 Nev. 204, 414 P.2d 942 (1966); *Ivey v. State*, 82 Nev. 449, 420 P.2d 853 (1966).

A federal question is not presented under this contention even if we were past the trial and convictions secured.

> "Allegations of insufficiency of the evidence and incompetency of minor witnesses are not matters which are reviewable by writ of habeas corpus in federal courts with respect to state conviction." *Dotson v. U.S.*, 314 F.2d 50 (C.A. Cal. 1965)

Response to Petitioner's Question 4

Petitioner asserts he was denied his constitutional rights because the grand jury refused to hear his testimony, pursuant to written requests attached to petition as Exhibits A and B. He cites no law for this position. Federal law not only denies any such right, but forbids any attempt to influence a grand jury by the sending of any letter relating to any matter pending before them.

In *Duke v. United States*, 90 F.2d 840 (4th Cir. 1937), it was stated:

> "There is no right on the part of one whose conduct is being investigated by the grand jury to petition the grand jury or to appear before it, which is guaranteed by the Constitution or otherwise; and it is important that the processes of criminal justice be not thus interfered with by those who have reason to think that their conduct is under investigation. Congress, for the protection of grand and petit juries from this sort of interference, has not only forbidden attempts to influence them corruptly or by threat of force, or by any threatening letter or communication, but has also forbidden any attempt to influence by the sending of any letter relating to any matter pending before them. It makes no difference that the letter here is addressed to the grand jury as a body instead of a particular juror. * * *

> "* * * And one who knowingly sends a letter to a grand jury which shows upon its face the intention that it shall be considered with respect to a pending case, cannot be heard to say that he did not attempt to influence the jury thereby, as the attempt to influence is inherent in the act of knowingly sending such a letter."

In *United States ex rel. Gene McCann v. D. E. Thompson*, 144 F.2d 604, the defendant claimed it was error of the grand jury to refuse to allow him to appear before it as a witness. The court said:

> "To this privilege he was not entitled. The practice was utterly unknown at common law and, although grand juries have in recent times occasionally invited persons, whose conduct they are examining, to appear, they are never obliged to do so."

Response to Petitioner's Question 5

Although petitioner has not, as yet, been brought to trial, he asserts he has been denied a speedy trial. The prosecution has done everything within its power to get this case to trial. We have responded to every motion, demurrer, and writ promptly and on time. We have sought no postponements and have made no motions that may have caused any delay in the trial.

Pursuant to order of the Nevada Supreme Court, recited on page 3 of Appendix B of petition, petitioner specifically waived any rights which could accrue to him by virtue of the trial date being set for July 1, 1968, although he recites he does not waive any rights which may have accrued prior to date of arraignments. (Record p. 302) He obviously does not desire to go to trial before July 1968 and has resisted all attempts of the state to set an early trial.

Even absent the waiver of the 60-day rule as described in the

record on page 302, petitioner has not been denied his constitutional rights. If anything, the state has been denied an early trial. Although *Klopfer v. State of North Carolina*, 386 U.S. 213, 18 L.Ed.2d 1, 87 S.Ct. 988, may apply the right to a speedy trial to the states through the 14th Amendment, the factual situation of the instant case does not resemble that which was presented in the Klopfer case and the justification for asserting violation of constitutional rights.

> "The right to a speedy trial in Nevada is legislatively given. The 60 day rule therein prescribed has flexibility. If the defendant is responsible for the delay of trial beyond the 60 day limit, he may not complain." *Oberle v. Fogliani*, 82 Nev. 428, 420 P.2d 251 (1966).

Any delay in the trial of this case has been caused by the defendants.

Response to Petitioner's Question 6

Petitioner contends he has been placed in jeopardy in violation of the Fifth Amendment to the Constitution of the United States. Jeopardy does not attach in this case. The contention is premature and the question cannot be raised in a habeas corpus proceeding.

> "Jeopardy does not arise until after the (trial) jury is properly impaneled." Wharton, Criminal Law and procedure, § 138 (1957 Ed.); *Conero v. United States*, 48 F.2d 69 (9th Cir. 1931).
>
> "The defendant is not placed in jeopardy when the (first) indictment is void." Wharton, Criminal Law and Procedure, § 139 (1957 Ed.).
>
> "Grand jury may on the evidence already received on the finding of an indictment, return a second indictment for the purpose of correcting a defect of form." Wharton, Criminal Law and Procedure, § 1735 (1957 Ed.).

"The issue of double jeopardy cannot be raised by a habeas corpus proceeding." *Barker v. State of Ohio*, 328 P.2d 582 (6th Cir. 1964).

CONCLUSION

The petitioner is untimely in filing his petition for certiorari and has not shown that he has been denied any right, privilege or immunity as guaranteed by the Constitution of the United States. He seeks review from the wrong decision and has not shown where there is any decision of the Nevada Supreme Court that is in conflict with a decision of this court. Respondent respectfully requests that the petition be denied.

Respectfully submitted this 22nd day of February, 1968.

HARVEY DICKERSON
Attorney General of Nevada

Attorney for Respondent.

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In the Supreme Court

OF THE

United States

October Term, 1967

No. 1091

Second Judicial District Court, State of Nevada, for the County of Washoe, the Honorable Thomas O. Craven, a District Judge therefore, (W. Mark Eddington, Real Party in Interest),

Petitioner,

vs.

State of Nevada,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To The Supreme Court
of the
State of Nevada

Morse & Graves,
Robert W. Hughes,
116 South Fourth Street
Las Vegas, Nevada

Attorneys for Petitioner.

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In the Supreme Court

OF THE

United States

October Term, 1967

No.

W. MARK EDDINGTON,
Petitioner,

vs.

THE STATE OF NEVADA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the Supreme Court of the
State of Nevada

Petitioner W. Mark Eddington, by and through his attorneys, Madison B. Graves and Robert W. Hughes, prays that a Writ of Certiorari issue to review the judgments of the Supreme Court of the State of Nevada.

A. OPINIONS BELOW

The Trial Judge sustained a Demurrer to the original Indictment in the above matter on the grounds of misjoinder on November 15, 1966. This decision was not reported nor appealed and under date of

November 29, 1966 the Grand Jury reindicted without taking further evidence although petitioner requested the right to appear and be heard.

The Trial Court issued an order discharging the petition on a Writ of Habeas Corpus on the grounds that the transcript of testimony before the Grand Jury was not sufficient to constitute probable cause for the finding of the Indictment. The State appealed from this order and the Nevada Supreme Court reversed this decision by Opinion filed September 25, 1967, and reported in 432 P.2d 87 (not yet reported in Nevada Official Reports, but referred to by Nevada State Supreme Court as Nos. 50363 and 5364), being Appendix A attached hereto.

A Motion for Rehearing was denied October 20, 1967. (See Nevada State Supreme Court Record.)

Subsequently petitioner filed another Petition for Writ of Habeas Corpus under date of November 2, 1967, setting forth grounds which petitioner felt had not been passed upon in the Opinion of the Supreme Court above mentioned. Thereafter the State obtained an order granting a Permanent Writ of Probition against the District Judge who had issued the Writ of Habeas Corpus and was going to hold a hearing thereon, said Permanent Writ of Prohibition being included herein as Appendix B.

B. JURISDICTION

i. The last judgment of the Nevada State Supreme Court sought to reviewed was entered and filed No-

vember 8, 1967, as appears from Appendix B, which was a continuation of proceedings arising out of a judgment entered and filed September 25, 1967, as appears from Appendix A. All other decisions, both before the Trial Court and the State Supreme Court, were prior to this date.

ii. There was no order regarding a rehearing nor any order granting an extension of time within which to petition for certiorari.

iii. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C., Section 1257 (3).

C. QUESTIONS PRESENTED

1. Do the Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States require that a presenation to a Grand Jury be made by an unbiased prosecutor and in a fair manner to grand jurors who are unprejudiced and who do not have a financial interest in the matter?

2. May a State Supreme Court, by use of a Writ of Prohibition, effectively suspend the use of the Writ of Habeas Corpus?

3. Was the evidence presented before the Grand Jury sufficient to justify the finding of an Indictment?

4. Is Section 172.270 Nevada Revised Statutes (hereinafter referred to as N.R.S.), which gives the Grand Jury the power to refuse to hear evidence for the defendant, violative of the Fifth, Sixth and Fourteenth

Amendments of the Constitution of the United States of America as being a denial of due process or denial of equal protection under law?

5. Was petitioner reindicted in violation of N.R.S. 174.280 and thus deprived of constitutional due process?

D. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment V, Constitution of the United States:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment VI, Constitution of the United States:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by

law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

Amendment XIV., Constitution of the United States, provides in part as follows:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, Section 9, Constitution of the United States, provides in part as follows:

"*Limitations on powers of Congress* . . . .

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it. . . ."

Article 1, Section 5, Constitution of the State of Nevada:

"*Suspension of habeas corpus.* The privilege of the writ of Habeas Corpus, shall not be suspend ed unless when in cases of rebellion or invasion the public safety may require its suspension."

Nevada Revised Statutes, Section 172.260 provides in part as follows:

> *"Evidence Receivable before grand jury.*
>
> 2. The grand jury can receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence."

Nevada Revised Statutes, Section 172.270:

> *"Grand jury not bound to hear evidence for defendant, but may order production of explanatory evidence; issuance of process for witness.* The grand jury is not bound to hear evidence for the defendant. It is their duty however, to weigh all evidence submitted to them, and when they have reason to believe that other evidence within their reach will explain away the charge, they must order such evidence to be produced, and for that purpose may require the district attorney to issue process for the witnesses."

Nevada Revised Statutes, Section 172.280:

> *"Degree of evidence to warrant indictment.* The grand jury ought to find an indictment when all the evidence before them, taken together, is such as, in their judgment, would, if unexplained and uncontradicted, warrant a conviction by the trial jury."

E. STATEMENT OF FACTS

Question 1: The principal prosecutor, Daniel R. Walsh, has represented the State in a previous civil

proceeding involving this defendant and the witnesses who appeared and testified against the defendant before the Grand Jury in a receivership action which was dismissed and later renewed by the State.

On this question the record shows in the transcript before the Grand Jury (see District Court Records) that the prosecutors presented a myriad of hearsay evidence favorable to the prosecution and permitted voluntary statements and prejudicial testimony to be presented. When a witness favorable to the defendant wished to make a hearsay statement he was admonished to refrain from doing so. (Vol. II, Grand Jury Transcript, pp. 330-331.)

Grand juror Manker failed to disclose her financial interest in Mark Twain and participated in returning an indictment. Special deputy Martillano was a stockholder of Mark Twain and had a similar financial interest as grand juror Manker (See District Court Records).

Question 2: Petitioner filed the Petition for Writ of Habeas Corpus (Appendix C) before the Second Judicial District Court of the State of Nevada, in and for the County of Washoe on November 2, 1967. On Monday, November 6, 1967, petition received a telegram which is marked "Appendix E" and annexed to this petition. When counsel appeared pursuant to the telegram he was served with a Petition for Alternative Writ of Prohibition, and after an informal, unreported, in-Chambers hearing on the matter the Supreme Court of the State of Nevada issued a Permanent Writ of Prohibition found in Appendix B.

Question 3: In this connection, the Supreme Court improperly reversed the trial judge, and to demonstrate the lack of understanding in its Opinion the Supreme Court stated:

> "The function of People's under the stock sales agreement has been discharged. A majority of the Board of Mark Twain believed that People's had ceased operations."

As a reading of the transcript before the Grand Jury will reveal this statement is not correct, and as indicated in the Supreme Court record no consideration was given by the Supreme Court to the request of petitioner to correct this misstatement of fact contained in a Petition for Rehearing (Appendix D). It is curious that this particular contention was never made by the prosecution in any argument preceding the Nevada Supreme Court Opinion.

With reference to the other statements in the Supreme Court Opinion to justify a finding that this petitioner might be guilty of embezzlement, the basic error of the Court is that they assumed the contractural obligation of People's terminated when Mark Twain commenced selling insurance. In fact, and as demonstrated by the Grand Jury transcript, Ex. G, the opposite was true.

Question 4: Under this question the only significant point is that in this case the defendant did request by letter, the right to appear before the Grand Jury and be heard and this was denied him. (See Appendix F.)

Question 5: As appears from the original record of the District Court in the devision of Judge John W. Barrett under date of November 15, 1966, while he did direct the case to be submitted to another or the same Grand Jury as provided by statute, he further gave the right to the Attorney General to decide how, when and why he would proceed.

F. MANNER AND TIME OF RAISING FEDERAL QUESTIONS BEFORE STATE COURT

Question 1: In petitioner's judgment the first time the question was properly presented to the state trial or appellate court was by the Petition for Writ of Habeas Corpus filed November 2, 1967, Appendix C herein. This matter was never heard because it was precluded from being heard by the Supreme Court's Permanent Writ of Prohibition, Appendix B.

Question 2: This question is raised before the United States Supreme Court for the first time because, by its action, the Nevada State Supreme Court created this question for the first time. The date of this Writ was November 8, 1967, Appendix B.

Question 3. This question was first determined favorably to petitioner by the Trial Court on May 18, 1967. This determination was reversed by the Supreme Court of Nevada on September 25, 1967, Appendix A. For the reason that petitioner wanted to exhaust all possible remedies before the state courts before seeking relief from the Federal courts and to

raise all possible questions before the state courts, petitioner filed a new Petition for Writ of Habeas Corpus in the state court, Appendix C, raising the other questions, with the exception of Question 2, which are presented in this petition. It is petitioner's position that the time for the consideration of all points here should commence to run from the date of the issuance of the Writ of Prohibition.

Question 4: The first time this question was formally presented to any Nevada court was by Appendix C, and the same has not been ruled on except by the Writ of Prohibition, Appendix B.

Question 5: This question was properly raised for the first time in Appendix C.

G. BASIS FOR FEDERAL JURISDICTION

Not applicable to this case.

H. REASONS FOR GRANTING THE WRIT

Preliminary Comment: Anticipating that the contention might be made that the Permanent Writ of Prohibition pertains only to matters preliminary to the trial of the defendant, W. Mark Eddington, petitioner urges the above entitled Court to rule upon the questions herein now so as to avoid the publicity, expense and time of a trial, the length of which has been estimated at six (6) weeks. The prosecution should be

forced to be fair at all stages, including the accusatory stage, and to refuse to hear this petitioner now for the reason that his case has not been tried and that he might well be acquitted is not fair due process justice. Basically what petitioner is seeking is a rule of law that will require proper conduct at all stages of a criminal proceedings, including an accusatory proceeding. To deny this petition will put the stamp of approval on two systems of criminal justice in the State of Nevada:

First, for those accused by complaint, having the benefit of a preliminary examination, confrontation of accusers, presentation of evidence and cross-examination of witnesses affording an accused of his constitutional rights as compared to,

Second, one where a prosecutor can get a Grand Jury to indict on evidence presented in a one-sided manner and from which hearing the defendant is effectively excluded.

1. As to the question of whether the presentation before a Grand Jury should be made by an unbiased prosecutor, although no cases were found squarely in point on this question, it would seem that this must be so because it would not occur to fair-minded men that the rule should be otherwise. Many questions have been raised where special prosecutors or unqualified prosecutors were presenting cases to Grand Juries. (See Wharton's Criminal Law and Procedure, Vol. 4, Sec. 1716, pp. 478-486 inclusive.)

Mr. Daniel R. Wash, Assistant Attorney General (for the State of Nevada) was an interested, biased and prejudiced prosecutor before the Grand Jury.

Walsh prepared the pleadings and participated in the decision on behalf of the State of Nevada to commence a receivership action against Mark Twain (State of Nevada, ex rel. **Louis T. Mastos v. Mark Twain Life Insurance Company.** Civil No. 26136, District Court of Ormsby County). This case was filed in September, 1965. After the aforesaid action was commenced, the life insurance business of Mark Twain eroded and as a direct result of Walsh's suit, Mark Twain lost in excess of $10,000,000 of insurance business. Stockholders of Mark Twain filed claims against the State of Nevada, its insurance commissioner and attorney general seeking to recover damages exceeding $800,000 for the wrongful receivership action above described. A stockholders' suit, under the Nevada Tort Claims Act was filed on July 13, 1966, **Eddington, et al v. State of Nevada, et al.** These suits were dismissed by mutual consent through negotiation. Both suits have been refiled and the State commenced these criminal proceedings. Walsh has been the principal attorney for the State of Nevada in all proceedings.

The grand jury transcript sets forth that four prosecutors appeared at various times during the three days that the grand jury met. The self-serving, inflammatory and prejudicial statements found in the transcript of the grand jury and this many attorneys appearing is prejudicial to the constitutional rights of

defendant. The statement of Martillaro at pages 226-227, lines 23, 24, 25, 26, 1, 2 and 3 is illustrative:

> Q. Mr. Wood this is an inquiry into the financial affairs of Mark Twain Life Insurance Company and People's Investment Company as to possible misappropriation of funds belonging to these two corporations and also **the relation of other satellite corporations which were used as funnels for moneys misappropriated from Mark Twain Life and People's Investment Company."** (Emphasis added.)

The case of **James V. Giles v. State of Maryland,** 386 U.S. 66, 17 L. ed. 2d 737, 87 S. Ct. 793, although involving a conviction of rape after a trial was had, might shed some light on the concept petitioner is advancing in this petition. Although the Court did not agree on an Opinion in the **Giles** case (supra), the questions involved were similar to the one involved here, namely, was there a denial of due process by an unfair prosecutor. In the **Giles** case apparently the prosecutor suppressed evidence concerning the credibility of witnesses on the issue of consent.

Grand juror, Mary Manker, was a stockholder and policyholder of Mark Twain, and her investment was substantial. The charging of embezzlement in an amount in excess of $300,000 against the officers of her company could not help to prejudice her against petitioner, an officer of Mark Twain. The Supreme Court of Nevada observed in **Burns Detective Agency v. Doyle,** 46 N. 91, 208 P.427, a very early case,

"For where your treasure is, there will your heart be also." (Matthew 6:21)

It is submitted that due process requires a fairer presentation before a Grand Jury, since only one side is there represented, than would the presentation by a prosecutor at a trial of a case.

2. The net result of the rulings of the Nevada State Supreme Court, so far as the petitioner is concerned, is that he has not had a hearing before any Court on the constitutional issues for the reason that the same were not properly before the Supreme Court in the first instance, and when it was sought to bring them before the Trial Court by the use of the habeas corpus writ (Appendix C) the Supreme Court of Nevada precluded the use of this procedure. Although not a technical suspension of the Writ of Habeas Corpus in the sense that it was suspended for all citizens in Nevada, it was, so far as this petitioner is concerned, an effective suspension of the use of the Writ before any of the state trial courts and certainly of the State Supreme Court.

3. On the issue of sufficiency of the evidence, the Nevada court erred in not following the Nevada statutes as to the degree of proof. It is submitted that the Nevada statutes, N.R.S. 172.260(2) and 172.280, when read together, require that there be legal evidence which is sufficient to meet the test of proof beyond a reasonable doubt where the evidence would stand unexplained and uncontradicted.

4. With reference to N.R.S. 172.270 this statute confers upon layman the right to withhold or grant a

fair hearing. In this case, as will appear from the record, this petitioner sought to be heard before the Grand Jury and was denied this right, (as further ap-Grand Jury and was denied this right. (See Appendix F.)

A person proceeded against by complaint, preliminary examination and filing of an Information has a right to present evidence, to confront his accusers and to cross-examine the witnesses, all of these being elements of fair-play due process. To permit a statute to confer upon layman the right to deny due process is violative of the Fourteenth, Fifth and Sixth Amendments of the United States Constitution. It presents a two systems of criminal justice to exist in this country — one by secret indictment and the other by open public accusation. Equal justice under the law cannot permit two completely different systems of criminal justice to exist with the discretion as to which system will be applied left to some appointed or elected official or to a Grand Jury composed of laymen where constitutional guarantees can be swept aside.

5. The contention that petitioner has once been placed in jeopardy in violation of the Fifth Amendment of the Constitution of the United States or should be released pursuant to Nevada statute, is based upon the concept that under N.R.S. 174.270 the trial judge should have directed the case, when he sustained the Demurrer in the first instance on the first Indictment, to be submitted to the same or another Grand Jury. The Trial Court did not properly exercise this prerog-

ative and instead conferred the right of further proceedings upon the discretion of the Attorney General's Office of the State of Nevada. It is submitted that this was not a compliance with N.R.S. 174.270, and that under Section 174.280 the defendant should have been discharged. Perhaps constitutional double jeopardy per se is not involved, but certainly the concept of double jeopardy as reflected in the statute is involved and was violated.

CONCLUSION

It is believed that the question of whether or not a defendant, as a matter of constitutional due process, is entitled to a fair presentation before a Grand Jury is a question of first impression to this Honorable Court and is a question of tremendous importance and the Court should consider it. To refuse to do so leaves open a device whereby two systems of criminal justice can exist in the statutes and be enforced at the will of a prsecutor, be he honorable or dishonorable. It paves the way for a different treatment of our citizens in the field of criminal justice.

The other points involved are not unique but nevertheless are meritorious. A careful reading of the transcript before the Grand Jury and even of the contentions thus far made by the prosecution in this case fail to disclose any evidence to justify an Indictment on the charge of embezzlement and a reading of the entire record, considering the various points raised,

it is submitted will convince this Honorable Court that a grave injustice has been thus far perpetrated on the petitioner in this case.

Lastly, although the Grand Jury system has long been a portion of our law enforcement structure, its initial purpose was to protect the citizen against over-aggression on the part of government law enforcers. It is common knowledge that it no longer serves this purpose and has now been perverted to the position where it gives Star-Chamber criminal justice to those who are unfortunate enough to have this type of an accusation levied against them because a prosecutor desires to handle the matter in this way.

The Petition for Writ of Certiorari should be granted.

Dated, Salt Lake City, Utah,

February 5, 1968

Respectfully submitted,

Robert W. Hughes,

Madison B. Graves,

Attorneys for Petition.

(Appendices A, B, C, D, E and F)

Appendix A

In the Supreme Court of the State of Nevada

Nos. 5363 and 5364

The State of Nevada,
Appellant,

vs.

W. Marking Eddington and
J. MacArthur Wright,
Respondents.

Appeal from orders of the Second Judicial District Court, Washoe County, granting writs of habeas corpus;

John W. Barrett, Judge.

The order in Case No. 5363 is affirmed, and the order in Case 5364 is reversed.

Harvey Dickerson, Attorney General; Daniel R. Walsh, Deputy Attorney General; Carl F. Martillaro, Special Deputy Attorney General, of Carson City, for Appellant.

Morse and Graves, of Las Vegas, and Robert W. Hughes, of Salt Lake City, Utah,
for Respondent W. Mark Eddington

Vargas, Dillon, Bartlett and Dixon, of Reno,
for Respondent J. MacArthur Wright.

OPINION

By the Court, Thompson, C.J.:

The issue presented by this consolidated appeal is the legal sufficiency of the evidence upon which a grand jury acted in returning two indictments charging embezzlement. One (Case No. 5363) alleged that Eddington and Frisby embezzled $100,000 from the People's Investment Company. The other (Case No. 5364) charges that Eddington, Wright, and Frisby embezzled $200,000 from the Mark Twain Life Insurance Company. Eddington and Wright challenged the sufficiency of the evidence through petitions for habeas corpus. **Shelby v. District Court,** 82 Nev. 204, 414 P.2d 942 (1966). Frisby did not interpose a challenge. The district court ruled that the evidence was not sufficient to warrant holding either defendant for trial and discharged each pursuant to his application for habeas corpus. We affirm that ruling in Case No. 5363, but reverse in Case No. 5364.

The quality and persuasive force of evidence needed to support an indictment are expressed by NRS 172.260(2) and NRS 172.280. The first commands that "none but legal evidence, * * * to the exclusion of hearsay or secondary evidence," shall be received. The second suggests that grand jurors should indict "when all the evidence before them, taken together, is such as, in their judgment, would, if unexplained and uncontradicted, warrant a conviction by the trial jury."

It is not useful to relate the mass of legal evidence presented to the grand jury. In the Mark Twain case there was ample to justify a belief that, absent explanation or contradiction, a trial jury could lawfully convict the defendants. Accordingly, we shall recite only an abbreviated version of the record simply to show that statutory standards were met. As to the People's Investment matter we shall briefly note wherein the showing was deficient.

People's and Mark Twain are domestic corporations. Each was chartered in 1963. The aim of Mark Twain was to qualify and do business as a stock life insurance company. People's was organized to conduct the sale of shares of stock in Mark Twain. In October, 1963 the two companies made an agreement giving People's authority to manage Mark Twain during the sale of the common stock to be offered by Mark Twain. Eddington was the vice-president and a director of Mark Twain, and the president and a director of People's. Wright was the secretary-treasurer, resident agent, director, and counsel for Mark Twain, and counsel for People's. Frisby was the president and a director of Mark Twain, and the secretary-treasurer and director of People's. Eddington and Frisby were a majority of the Board of Directors of People's and, with Wright, composed the "executive committee" of Mark Twain.

Enough of the common stock of Mark Twain was sold by October, 1964 to cause the State to issue Mark Twain a license to do business as a stock life insurance company. The function of People's under the

stock sales agreement had been discharged. A majority of the Board of Mark Twain believed that People's had ceased all operations.

Mark Twain commenced selling insurance in January, 1965. From then through September, 1965, more than $200,000 left its treasury without authority from the Board of Directors. Most of that amount was paid out as "insurance commissions" to People's ($107,000), and to Eddington ($34,421.22) and Frisby ($32,000), individually. The charter of People's did not grant it authority to solicit or sell insurance, nor was an agent's license issued to it for that purpose. Although the minutes of Mark Twain ambiguously reflect that its "executive committee" (Eddington, Wright, and Frisby) had approved an arrangement with People's, and with Eddington and Frisby individually, to sell Mark Twain insurance on a commission basis, the majority of the Board of Directors of Mark Twain assert that such arrangement was never presented to them for consideration and approval, and that the minutes prepared by Wright so indicating, are false. In any event, the record shows that the sums expended by Mark Twain for "insurance commissions" substantially exceed the percentages authorized by the committee, assuming its authority to act for Mark Twain. The record also shows payments totalling $15,000 to Wright as counsel fees, and almost $43,000 in "travel expense," each without approval of the Board. Indeed, the majority of the Board was kept in the dark about these expenditures. When they inquired, the members of the executive committee would engage in a filibuster and refuse to respond candidly. Even phys-

ical violence was threatened. The stability of Mark Twain deteriorated and the company was placed in receivership.

These facts justify the belief held by the grand jury that substantial funds of Mark Twain were fraudulently appropriated by Eddington, Frisby, and Wright. the Elements of embezzlement [NRS 205.300] are present. A fiduciary relationship existed between Mark Twain and those charged with defalcations. Cf. Carter v. State, 79 Nev. 89, 378 P.2d 876 (1963). Money was used for purposes other than those for which entrusted thus permitting an inference of fraudulent intent. State v. Trolson, 21 Nev. 419, 32 P. 930 (1893). A prima facie case was made. Whether it will persuade at trial where the defendants will be present with counsel, and afforded an opportunity to explain their conduct, is another matter, wholly irrelevant to the issue at hand.

Although Eddington and Wright suggest that the grand jury should have heard from them before returning idictments, the grand jury was not required to do so. NRS 172.270. Indeed, had they been granted an audience, the grand jury would not have been required to accept their explanations, but could indict notwithstanding them. In this respect the grand jury function is not unlike that of the justice of the peace upon a preliminary examination. [See State v. Fuchs, 78 Nec. 63, 368 P.2d 869 (1962), where we held that the evidence at the preliminary hearing was sufficient to justify holding the accused to answer in the district

court, notwithstanding her written exculpatory statement received in evidence.]

The indictment charging embezzlement from People's Investment is not supported by sufficient evidence to warrant trial. Although the record reflects substantial expenditures without explanation, there is nothing to show that the expenditures were unauthorized. Of course, the money flow from Mark Twain to People's and out, may well be competent evidence at the trial of the Mark Twain case.

Other contentions respecting the two indictments have been considered and are without substance. The order of the district court granting habeas corpus in the Mark Twain Case No. 5364 is reversed, and the cause remanded to the district court for trial. The order granting habeas corpus in the People's Investment Case No. 5363 is affirmed.

Thompson, C.J.

We concur:

Collins, J.
Zenoff, J.

Filed September 25, 1967,
C. R. Davenport, Clerk.

Appendix B

In the Supreme Court of the State of Nevada

No. 5464

State of Nevada,

Petitioner,

vs.

Second Judicial District Court, State of Nevada, for the County of Washoe, the Honorable Thomas O. Craven, a District Judge thereof,

Respondent.

PERMANENT WRIT OF PROHIBITION

The State of Nevada to the Second Judicial District Court and the Honorable Thomas O. Craven, District Judge thereof, greetings:

Where as, Harvey Dickerson, Attorney General of the State of Nevada, by and through Daniel R. Walsh, Chief Deputy Attorney General, Carl F. Martillaro, Special Deputy Attorney General, and John A. Porter, Deputy Attorney General, did, in our Supreme Court of the State of Nevada, present facts by verified petition that the Second Judicial District Court, Honorable Thomas O. Craven, Judge thereof, is about to hold hearings and decide matters already determined by this Court, and is exceeding the jurisdiction of said

court in doing so unless restrained and prohibited from doing so; and

Whereas, the Supreme Court of the State of Nevada did on the 8th day of November, 1967, hold a hearing in chambers on this matter, with the following counsel present: John C. Renshaw of Vargas, Bartlett and Dixon, attorneys for J. MacArthur Wright; Madison B. Graves, Esq., attorney for W. Mark Eddington; J. Rayner Kjeldsen, Esq., attorney for C. Larry Frisby; Daniel R. Walsh, Carl F. Martillaro, and John A. Porter; and

Whereas, it has been determined by this Court that the matters presented by the petition for writ of habeas corpus filed by J. MacArthur Wright and petition for writ of habeas corpus filed by W. Mark Eddington, joined in by defendant C. Larry Frisby, and the matters presented by a petition for stay filed by defendant W. Mark Eddington, have been previously presented to this Court and found to be without merit or substance; and

Whereas, the District Court is without jurisdiction to reconsider these matters previously disposed of by this Court,

It Is Hereby Ordered that the Second Judicial District Court, Honorable Thomas O. Craven, Judge thereof, be and is hereby prohibited, enjoined and restrained from considering or acting further on the petitions for habeas corpus presented by defendants J. MacArthur Wright, W. Mark Eddington and C. Larry Frisby and assigned Washoe County Civil Nos. 240497 and 240498.

It Is Further Ordered that the said Court and Judge be prohibited, enjoined and restrained from considering or acting further on a petition for stay filed by defendant W. Mark Eddington in Washoe County Criminal Case No. 233307.

It Is Further Ordered that the described petitions for habeas corpus and stay be and they hereby are dismissed.

It Is Further Ordered that counsel for each of the defendants notify this Court in writing by November 15, 1967, whether each and every defendant will or will not waive the sixty day rule for trial on the merits.

Done at Carson City, Nevada, this 8th day of November, 1967.

/s/ Thompson

Gordon Thompson, Chief Justice

/s/ Collins

Jon Collins, Justice

/s/ Zenoff

David Zenoff, Justice

Filed November 8, 1967.

C. R. Davenport, Clerk.

Appendix C

No. 23307 Dept. 2

IN THE SECOND UDICIAL DISTICT COURT
OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

IN THE MATTER OF THE APPLICATION
OF
W. MARK EDDINGTON FOR A WRIT OF HABEAS CORPUS

PETITION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE THOMAS CRAVEN, JUDGE OF THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE, DEPARTMENT NO. 4 THEREOF:

COMES NOW, W. MARK EDDINGTON, acting by and through his counsel, MADISON B. GRAVES, ESQ. of MORSE & GRAVES and ROBERT W. HUGHES, ESQ. appearing and making this request, and petitions the above entitled Court for the issuance of a Writ of Habeas Corpus and as grounds therefor states:

I.

That he, the said W. Mark Eddington, is unlawfully restrained of his liberty by C. W. Young, Sheriff

of Washoe County, State of Nevada; that said restraint consists in this, that the said W. Mark Eddington has been required to appear before the above entitled Court and is currently released by said Court on $25,000.00 bail but with the requirement that he appear before the Court to plead to the Indictment pending against him on charges of embezzlement.

II.

That the said restraint of libery is illegal and that the illegality thereof consists in this, to-wit:

1. The indictment is predicated upon illegal evidence presented to the Grand Jury of Washoe County in violation of his constitutional rights of the United States of America.

2. The laws of Nevada under which he was indicted were unconstitutional and in violation of his constitutional rights of the United States of America.

3. The Grand Jury impaneled had at least one member who was biased and prejudiced and had a financial interest in the subject matter on which the indictment is predicated and the prosecutors who presented evidence to the Grand Jury were biased and prejudiced and failed and refused to furnish said Grand Jury with evidence in their possession which would exonerate him, which interests and actions are in violation of his constitutional rights as guaranteed by the constitution of the United States of America.

The constitutional rights of petitioner which have been violated are encompassed in the Fifth, Sixth

and Fourteenth Amendments of the United States Constitution.

WHEREFORE, your petitioner prays as follows:

1. That a Writ of Habeas Corpus be granted, directed to the said C. W. YOUNG, Sheriff of Washoe County as aforesaid, commanding him to have the body of the said W. MARK EDDINGTON before this Honorable Court at a time and place therein to be specified, to do and receive what shall then and there be considered by this Court, concerning said W. MARK EDDINGTON, together with the time and cause of his restraint, and said Writ; and that he, the said W. MARK EDDINGTON, may be restored to his liberty and an order be entered directing the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, to dismiss the Indictment pending against him.

Dated this 2nd day of November, 1967.

MORSE and GRAVES

MADISON B. GRAVES

ROBERT W. HUGHES

By: Madison B. Graves

Attorneys for Petitioner
116 South Fourth Street
Las Vegas, Nevada

Appendix D

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA, Appellant, vs. W. MARK EDDINGTON and J. MACARTHUR WRIGHT, Respondents.	No. 5364

RESPONDENT MARK EDDINGTON'S PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

Comes now W. Mark Eddington, through his attorneys, Madison B. Graves of Morse and Graves, and Robert W. Hughes, and respectfully petitions this honorable Court for a rehearing of the above entitled case.

Mark Twain Life Insurance Company is hereafter referred to as "Mark Twain" and Peoples Investment Company is referred to as "Peoples".

This petition is based upon the following grounds:

POINT I. THE COURT MUST CONSIDER AND RELATE THE MASS OF TESTIMONY PRESENTED TO THE GRAND JURY AND TO DISCERN WETHER IT WAS "NONE BUT LEGAL EVIDENCE" * TO THE EXCLUSION OF HEARSAY OR SECONDARY EVIDENCE, AND WHETHER THE GRAND JURY PROPERLY INDICTED RESPONDENT "WHEN ALL THE EVIDENCE BEFORE THEM TAKEN TOGETHER IS SUCH AS, IN THEIR JUDGMENT WOULD, IF NOT**

EXPLAINED AND NOT CONTRADICTED WARRANT A CONVICTION BY THE TRIAL JURY (NRS 172.260 (2) and NRS 172.280).

PPOINT II. PEOPLES WAS NOT LIMITED IN ITS MANAGEMENT OF MARK TWAIN UNDER ITS AGREEMENT EXHIBIT G, UNTIL ONLY SUFFICIENT STOCK WAS SOLD TO THE PUBLIC TO PERMIT MARK TWAIN TO COMMENCE BUSINESS AS A LIFE INSURANCE COMPANY. IN FACT, EXHIBIT G CLEARLY EXPRESSED AN INTENT THAT PEOPLES SHOULD MANAGE MARK TWAIN UNTIL THE TERMINATION OF STOCK SALES WHICH OCCURRED ON JUNE 30 1965 (EX.S). PEOPLES HAD THE LEGAL RIGHT AND THE CORRESPONDING OBLIGATION TO MANAGE MARK TWAIN PURSUANT TO EXHIBIT G IN ALL FACETS OF ITS BUSINESS INCLUDING THE SALE OF LIFE INSURANCE. THIS RIGHT TERMINATED JUNE 30. 1965.

POINT III. A TRIAL JUDGE HAS A DUTY TO STRIKE AN INDICTMENT OR ISSUE A WRIT OF HABEAS CORPUS WHERE IT IS FOUNDED ON ILLEGAL EVIDENCE.

POINT IV. THE UNITED STATES CONSTITUTION AND THE NEVADA CONSTITUTION PROVISIONS FOR DUE PROCESS WERE VIOLATED IN THE MANNER EVIDENCE WAS PRESENTED TO THE GRAND JURY.

BRIEF IN SUPPORT OF PETITION FOR REHEARING

POINT I

THE COURT MUST CONSIDER AND RELATE THE MASS OF TESTIMONY PRESENTED TO THE GRAND JURY AND TO DISCERN WHETHERE IT WAS "NONE BUT LEGAL EVIDENCE" *** TO THE EXCLUSION OF HEARSAY

OR SECONDARY EVIDENCE, AND WHETHER THE GRAND JURY PROPERLY INDICTED RESPONDENT "WHEN ALL THE EVIDENCE BEFORE THEM TAKEN TOGETHER, IS SUCH AS, IN THEIR JUDGMENT WOULD, IF NOT EXPLAINED AND NOT CONTRADICTED, WARRANT A CONVICTION BY THE TRIAL JURY" (NRS 172.260(2) and NRS 172.280).

This court noted that it was "not useful to relate the mass of legal evidence presented to the Grand Jury". It is admitted that the Grand Jury transcript clearly discloses that a mass of evidence was presented to the Grand Jury, but very little of it was legal evidence. In fact, a reading of the Grand Jury transcript clearly demonstrates a total lack of regard to the statutory requirement "that hearsay and secondary evidence shall be excluded". Witnesses were admonished by counsel in such a manner as to incite and to raise a presumption of guilt on the part of the respondent without the witnesses giving any testimony. All of the evidence presented to the Grand Jury was either predicated upon leading questions, questions put to witnesses without proper qualification or foundation, answers based upon hearsay, conclusions furnished by witnesses who were not properly qualified, and a dirth of incompetent, irrelevant and immaterial evidence.

The following witnesses total testimony was incompetent, irrelevant and immaterial: Hale B. Bennett, Lamar Wilson, William Norris, Donald Giard, John Riccobene, Jean S. Kean, Dennis Patheal, Lew Hardy, John White, and most of Russell M. Johns testimony.

Exhibit S, introduced through the testimony of Mr. Johns, constitutes an flagrant example of illegal evidence which was filled with damaging conclusions to respondent. Exhibit S's author was deceased and his conclusions preempted the function of both judge and jury. No supporting evidence was identified or testified about by Mr. Johns which would support the damaging conclusions contained in Exhibit S.

Particular reference is made to the lack of licensing theory encompassed in the conclusions of the author. The only legal evidence before the Grand Jury by the remaining witnesses not mentioned above, concerned matters not directly related to the crime of embezzlement. There was some testimony as to purported forgery, nonpayment of amounts due salesmen, and other general testimony as to the method and mode of operation of the subject company which did not support the purported claim of embezzlement.

POINT II

PEOPLES WAS NOT LIMITED IN ITS MANAGEMENT OF MARK TWAIN UNDER ITS AGREEMENT EXHIBIT G, UNTIL ONLY SUFFICIENT STOCK WAS SOLD TO THE PUBLIC TO PERMIT MARK TWAIN TO COMMENCE ITS BUSINESS AS A LIFE INSURANCE COMPANY. IN FACT, EXHIBIT G CLEARLY EXPRESSED AN INTENT THAT PEOPLES SHOULD MANAGE MARK TWAIN UNTIL THE TERMINATION OF STOCK SALES WHICH OCCURRED ON JUNE 30, 1965 (EX. S). PEOPLES HAD THE LEGAL RIGHT AND THE CORRESPONDING OBLIGATION TO MANAGE MARK TWAIN PURSUANT TO EXHIBIT G IN ALL FACETS OF ITS BUSINESS INCLUDING THE SALE OF LIFE INSUR-

ANCE. THIS RIGHT TERMINATED JUNE 30, 1965.

The author of Exhibit S included at page 54 the agreement between Peoples and Mark Twain, but he failed to include the subject agreement as contained in Exhibit G which was on file in the Insurance Commissioner's office and which provided for the Insurance Commissioner's approval of the contractural arrangement between the subject corporations and for the total management of Mark Twain by Peoples. Exhibit S is the only evidence in the Grand Jury transcript upon which a purported breach of trust could be predicated. No witness independently testified to the unlawful conclusions contained in Exhibit S. Exhibit G, was in fact approved by Insurance Commissioner Hammel. This contract permitted the management of Mark Twain by Peoples until 84,500 shares of Mark Twain's stock was sold. Commissioner Hammel issued the charter or license of Mark Twain in 1964 while Peoples was actively engaged in selling Mark Twain stock. The act of issuing the charter to permit Mark Twain to sell life insurance is approval by the Commisisoner of insurance of Peoples managing Mark Twain's sale of insurance. In support of this position, one need only look to Exhibit G where Insurance Commissioner Hammel required that someone other than Peoples be permitted to act as a general agent. Directors Luster and Riccabene were the only directors appearing before the Grand Jury, and they cannot explain away their conduct or lack of knowledge, or testify concerning the management of the corporation when such was a matter of public

record. Directors Luster and Riccabene had the responsibility to know what documents pertaining to the company were on file in the Insurance Commissioner's office as a matter of law. This Court found that a majority of directors appeared before the Grand Jury and did not know of the contractual arrangement between Peoples and Mark Twain, or facts concerning the management of the corporation. This conclusion is not warranted by the record in this matter. There were only four directors of Mark Twain, namely: W. Mark Eddington, Vaughan Cannon, Henry Luster, and John Riccabene. See the order of District Court Judge Richard L. Waters, Jr. in Case No. 26113, **Mark Twain Life Insurance Company, et al v. Vaughn M. Cannon et al.**

Exhibit G is clear on the point that Peoples had a right to manage Mark Twain or direct the stock offering period of Mark Twain which expired on June 30, 1965. There is no other evidence in the Grand Jury record contrary to this statement. Exhibit G, if it would not permit the continued management by Peoples on behalf of Mark Twain after June 30, 1965, at least was a contract approved by the Insurance Commissioner, contracted with Mark Twain to act as a general agent.

POINT III

A TRIAL JUDGE HAS A DUTY TO STRIKE AN INDICTMENT OR ISSUE A WRIT OF HABEAS CORPUS WHERE IT IS FOUNDED ON ILLEGAL EVIDENCE.

District Court Judge Barrett was correct in granting a Writ of Habeas Corpus for respondent Eddington.

In fact, he had a duty to so do when he learned independently from the grand jurors themselves that they received illegal evidence. The courts of Nevada, apparently, have not had occasion to consider a situation where one indicted charged that he was indicted on illegal evidence for one hundred two years. In **State v. Logan,** 1 Nev. 509, a county tax collector was charged with embezzlement. His attorney raised the question of illegal evidence being presented to the Grand Jury and requested that the indictment be stricken. The District Court permitted a hearing and granted the motion. This Court set the precedent aside where the grand jurors were required to testify concerning the evidence they received in the grand jury room. But this Court clearly observed that where illegal evidence was presented and could be determined from an independent source, that it would be proper to set aside such an indictment founded on illegal evidence and presumably, as in this case, to issue a Writ of Habeas Corpus.

Grand Jury can receive none but legal evidence. See **Underhill's Criminal Evidence,** Volume 1, Section 76, 28 LRA 318-320. The inclusion of illegal evidence by the prosecution before the grand jury requires that the indictment be set aside or a Writ of Habeas Corpus issued.

POINT IV

THE UNITED STATES CONSTITUTION AND THE NEVADA CONSTITUTION PROVISIONS FOR DUE PROCESS WERE VIOLATED IN THE MANNER EVIDENCE WAS PRESENTED TO THE GRAND JURY.

Due process simply means fair play at all stages of a criminal prosecution. The State of Nevada, in electing to proceed by a grand jury indictment, took upon itself the obligation to present all evidence in its possession to the Grand Jury. The prosecution had the obligation to present all evidence, even though helpful to the accused. **State v. Smith.** 74 NY S 2d 524. The safeguards of the Fourteenth Amendment of the United States Constitution have been violated in the proceeding before the Grand Jury and respondent's constitutional rights require affirmance of the Order of the District Court of Washoe County.

CONCLUSION

If substantial illegal evidence is received by a Grand Jury, and an indictment could not issue except by the inclusion of the illegal evidence to form the elements of the crime charged, then the illegal evidence colors the entire Grand Jury proceedings, and such an indictment should be quashed, or a Writ of Habeas Corpus issue.

The Order of the Honorable John W. Bartlett of the Second Judicial District Court should be affirmed.

Respectfully submitted,

MADISON B. GRAVES
MORSE & GRAVES
ROBERT W. HUGHES
By /s/ Robert W. HUGHES
ROBERT W. HUGHES

Appendix E

Western Union Telegram

352P PST NOV 6 67 PRA370

PR CYAQ35 RX DCARSON CITY NEV 6 336P PDT

ROBERT W HUGHES ESQ

9 EXCHANGE PLACE SUITE 707 SALT LAKE CITY UTAH

THE STATE IS GOING TO SEEK A WRIT OF PROHIBITION AGAINST THE SECOND JUDICIAL DISTRICT COURT, PROHIBITING IT FROM PROCEEDING FURTHER ON THE WRITS FILED AND JOINED IN BY THE DEFENDANTS IN THE MARK TWAIN CASE. PLEASE APPEAR BEFORE THE NEVADA SUPREME COURT AT 10 AM · WEDNESDAY NOVEMBER 8, 1967, AT WHICH TIME THE STATE WILL SEEK ITS ALTERNATIVE WRIT

HARVEY DICKERSON ATTORNEY GENERAL

10AM 8 1967
(50).

LIBRARY
SUPREME COURT U. S.

FILED
MAR 8 1968
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1967

NO. 1091

SECOND JUDICIAL DISTRICT COURT, STATE OF NEVADA, FOR THE COUNTY OF WASHOE, THE HONORABLE THOMAS O. CRAVEN, A DISTRICT JUDGE THEREOF, (W. MARK EDDINGTON, REAL PARTY IN INTEREST), *Petitioner,*

vs.

THE STATE OF NEVADA, *Respondent.*

MEMORANDUM FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

HARVEY DICKERSON
Attorney General of Nevada
Supreme Court Building
Carson City, Nevada 89701

Attorney for Respondent.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1967

NO. 1091

SECOND JUDICIAL DISTRICT COURT, STATE OF NEVADA, FOR THE COUNTY OF WASHOE, THE HONORABLE THOMAS O. CRAVEN, A DISTRICT JUDGE THEREOF, (W. MARK EDDINGTON, REAL PARTY IN INTEREST), *Petitioner,*

vs.

THE STATE OF NEVADA, *Respondent.*

MEMORANDUM FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

HARVEY DICKERSON
Attorney General of Nevada
Supreme Court Building
Carson City, Nevada 89701
Attorney for Respondent.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1967

NO. 1091

SECOND JUDICIAL DISTRICT COURT, STATE OF NEVADA, FOR THE COUNTY OF WASHOE, THE HONORABLE THOMAS O. CRAVEN, A DISTRICT JUDGE THEREOF, (W. MARK EDDINGTON, REAL PARTY IN INTEREST), *Petitioner,*

vs.

THE STATE OF NEVADA, *Respondent.*

MEMORANDUM FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

NEVADA SUPREME COURT'S OPINION ON APPLICATION FOR WRIT OF HABEAS CORPUS

On November 8, 1967, the Nevada Supreme Court issued and entered a writ prohibiting the state district court from hearing

a second petition for writ of habeas corpus filed by petitioner before trial. This writ is attached as Appendix C of petition. The reason for its issuance was to prohibit the district court from hearing identical matters presented to the state supreme court, which decided on September 25, 1967, that the contentions were without merit or substance. Appendix A of petition.

JURISDICTION

We respectfully submit that petitioner has failed to show that this court has jurisdiction of this case, for the following reasons:

I.

1. The issues raised in the above-entitled cause were argued and submitted to the Nevada Supreme Court, and an opinion was rendered and judgment entered on September 25, 1967, by that court. *State of Nevada v. W. Mark Eddington and J. MacArthur Wright*, 432 P.2d 87, and attached as Appendix A to petition.

2. The petitioner is apparently seeking certiorari from a permanent writ of prohibition issued by the Nevada Supreme Court on November 8, 1967, and attached as Appendix B to the petition. That court prohibited the state district court from hearing a second petition for writ of habeas corpus filed by Mr. Eddington because the matters alleged had been previously presented to the Nevada Supreme Court and found to be without merit or substance by its September 25, 1967, decision.*

3. The issues raised in the present petition disclose that petitioner is actually seeking certiorari from the September 25, 1967, decision of the Nevada Supreme Court. This is an improper

---

*The petition for certiorari in this case was captioned W. Mark Eddington, Petitioner, v. The State of Nevada, Respondent, and changed to the present caption by order of the Clerk of the United States Supreme Court.

attempt to do indirectly that which petitioner is precluded from doing directly because of time limitations.

4. This is apparent from the application for stay filed in the United States Supreme Court by petitioner, W. Mark Eddington, on or about the 20th day of October, 1967. Appendix A herein. The application for stay was denied by Mr. Justice Douglas on October 31, 1967. Appendix B herein. The application specifically recites that he sought the stay of the execution of the judgment of the Nevada Supreme Court of September 25, 1967, on the same grounds now alleged in his petition for certiorari. It also recites a certification of Mr. Eddington's attorney that it was his bona fide intention to make application for certiorari within 90 days. This he failed to do.

5. The petition was filed February 7, 1968, more than ninety days since the entry of judgment by the Nevada Supreme Court on September 25, 1967. The period for applying for a writ of certiorari has not been extended by a Justice of this court (Rule 22(1) of this court).

II.

The petitioner has failed to comply with Rule 23(f) of this court. Among other matters, he has failed to specify the state of the proceeding in the state court. The state is still attempting to get to trial to have the guilt or innocence of the defendants determined in a court of law. To this extent we do not have a final judgment, as the matter is not concluded. The jurisdictional requirement of finality does not appear to be present.

III.

If it is not clear from the record whether the state supreme court has decided a federal question by its decision, September 25, 1967, Appendix A to petition, the petitioner has failed to

acquire a certificate from the state court that question was raised and decided. The following is found in Stern and Gressman, Supreme Court Practice, pp. 102, 103 (1962 Ed.):

> "As has been noted, it is essential to the exercise of the Supreme Court's jurisdiction under § 1257 that a substantial federal question be raised before the highest state court. If the federal question was explicitly decided, the Supreme Court assumes that it was properly raised. But if the question was ignored by the highest state court, the litigant is then called upon to demonstrate that the question was properly and timely raised.
>
> "It may not always be clear from the record that the federal question was raised before the highest state court or necessarily decided by it. The practice has therefore developed in doubtful cases of obtaining a certificate from the highest state court to the effect that a federal question was raised and decided. * * *"

QUESTION PRESENTED

The respondent contends that because of untimely filing, the only question presented by this petition is whether a state supreme court, by use of a writ of prohibition, may effectively suspend the use of a writ of habeas corpus when the petition for writ of habeas corpus is employed in the manner disclosed in this case. However, we will respond in our argument to all of petitioner's contentions.

STATEMENT OF THE CASE

On November 2, 1967, petitioner filed the petition for habeas corpus attached to petition as Appendix C. On November 8, 1967, the Nevada Supreme Court issued a permanent writ prohibiting the state district court from considering or acting on this petition. Appendix B of petition. The Nevada Supreme Court recited in this writ of prohibition that it had determined that

the matters presented by the petition for writ of habeas corpus (attached to the petition herein as Appendix C) had been previously presented to the Nevada Supreme Court and found to be without merit or substance. See Exhibit A of petition. Petitioner now seeks certiorari of the November 8, 1967, writ of prohibition, and seeks to raise issues determined by the Nevada Supreme Court in its decision of September 15, 1967, whereby it remanded the case back for trial. The case is pending trial.

ARGUMENT

Response to Petitioner's Questions 1 and 2

Petitioner contends the prosecutors were prejudiced against the defendants; that they conducted themselves in an improper manner before the grand jury and introduced improper evidence. The Supreme Court of the State of Nevada, by unanimous decision, determined, after study of the transcript, that these contentions were without merit or substance. Appendix A and B to petition. The allegations are made through an unverified petition. Appendix C to petition.

If the defendants had succeeded in their attempts to hold a hearing in the state district court on these allegations, they would have effectively been allowed to try the prosecutors before they went to trial themselves. The state, by the nature of the allegations, had been placed on the defensive and the defendants, through this and other similar tactics, have been able to avoid trial to date. To a great extent, the due administration of criminal justice has been delayed by these legal maneuvers of the defendants. Even if the allegations were true, which we strenuously deny, and the Supreme Court of Nevada found to be untrue, a constitutional issue has not been raised. If it were the law that a criminal defendant could be denied due process as contended,

we could envision a situation wherein every prosecutor in every criminal case could be placed in a position of defending his integrity and motives at a hearing set for that purpose prior to trial, and resulting from allegations made by a criminal defendant, whether they be true or false.

Although difficult to understand, this is exactly the position into which the state was placed after the Supreme Court of Nevada had ruled, adversely to the defendants, on a previous writ of habeas corpus presenting the same issues. The defendants have presented no law applicable to their argument. There is none. *Giles v. Maryland*, 386 U.S. 66, 17 L.Ed.2d 737, 87 S.Ct. 793, concerned a prosecutor who suppressed evidence at trial that may have exonerated the defendant. We have not been to trial in the instant case, and if we knowingly suppressed evidence of innocence, we not only should be reversed, but disciplined. In regard to the present allegation, we can only state that we do not have any evidence that would prove the innocence of the defendants of the crime charged, nor did we present any false evidence to the grand jury to our knowledge then or now.

The Nevada Supreme Court also found the allegation that a grand juror had a substantial investment in the company that prejudiced her against the officers of the corporation was also without merit or substance. This seems to be conceded by petitioner in his application for stay attached hereto as Appendix A. In any event, a constitutional issue is not raised.

The Nevada Supreme Court may and did suspend the use of a writ of habeas corpus in proceedings involving a second and successive petition raising the same questions previously presented and determined.

> "Nothing in traditions of habeas corpus requires federal courts to tolerate needless piecemeal litigation, or entertain collateral proceedings whose only purpose is to vex, harass,

or delay." *LeClair v. U.S.*, 241 F.Supp. 819 (D.C. Ind. 1965)

"Second and successive petition for writ of habeas corpus need not be entertained unless it raises questions not previously presented and determined." *Walker v. Taylor*, 338 F.2d 945 (C.A. Kan. 1964)

"Where petition for writ of habeas corpus is repetitious of previous petitions it should be dismissed." *Com. ex rel. Huber v. Myers*, 146 A.2d 666.

Response to Petitioner's Question 3

The Supreme Court of Nevada has determined that there was a mass of legal evidence presented to the grand jury in this case to sustain the indictment and, in fact, enough to justify a belief that, absent explanation or contradiction, a trial jury could lawfully convict the defendants. Appendix A to petition. The defendants in this case have been accorded privileges beyond those established as constitutional rights by this court.

It is now settled by the decision of the United States Supreme Court in *Costello v. United States* (1956), 350 U.S. 359, 100 L.Ed. 397, 76 S.Ct. 406, that an indictment is not open to challenge in a federal court on the ground that it is based solely upon incompetent evidence. The actual holding was that an indictment cannot be challenged on the ground that only hearsay evidence was presented to the grand jury. The Court observed that "if indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed"; that "the result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury."

The defendants have had a preliminary trial on the competency and adequacy of the evidence before the grand jury, plus a state supreme court ruling on the issue. They have sought, and continue to seek by this petition, other preliminary trials on issues already disposed of.

Nevada evidentiary requirements and this record disclose that the defendants have been accorded rights completely beyond those necessary under federal law. Perhaps even to the extent of permitting the state to be substantially hindered in its attempt to fulfill obligations imposed upon it by law.

Under federal law the question generally could not be reached until after trial. A grand jury transcript is allowed to a defendant only where there is a compelling need for such disclosure and the disclosure is required by the ends of justice.

In Nevada, a criminal defendant is allowed a copy of the transcript as a matter of course. *Shelby v. Sixth Judicial District Court*, 82 Nev. 204, 414 P.2d 942 (1966); *Ivey v. State*, 82 Nev. 449, 420 P.2d 853 (1966).

A federal question is not presented under this contention even if we were past the trial and convictions secured.

> "Allegations of insufficiency of the evidence and incompetency of minor witnesses are not matters which are reviewable by writ of habeas corpus in federal courts with respect to state conviction." *Dotson v. U.S.*, 314 F.2d 50 (C.A. Cal. 1965)

Response to Petitioner's Question 4

Petitioner asserts he was denied his constitutional rights because the grand jury refused to hear his testimony, pursuant to written requests attached to petition as Exhibits A and B. He cites no law for this position. Federal law not only denies any such right, but forbids any attempt to influence a grand jury by the sending of any letter relating to any matter pending before them.

In *Duke v. United States*, 90 F.2d 840 (4th Cir. 1937), it was stated:

> "There is no right on the part of one whose conduct is being investigated by the grand jury to petition the grand jury or to appear before it, which is guaranteed by the Constitution or otherwise; and it is important that the processes of criminal justice be not thus interfered with by those who have reason to think that their conduct is under investigation. Congress, for the protection of grand and petit juries from this sort of interference, has not only forbidden attempts to influence them corruptly or by threat of force, or by any threatening letter or communication, but has also forbidden any attempt to influence by the sending of any letter relating to any matter pending before them. It makes no difference that the letter here is addressed to the grand jury as a body instead of a particular juror. * * *
> "* * * And one who knowingly sends a letter to a grand jury which shows upon its face the intention that it shall be considered with respect to a pending case, cannot be heard to say that he did not attempt to influence the jury thereby, as the attempt to influence is inherent in the act of knowingly sending such a letter."

In *United States ex rel. Gene McCann v. D. E. Thompson*, 144 F.2d 604, the defendant claimed it was error of the grand jury to refuse to allow him to appear before it as a witness. The court said:

> "To this privilege he was not entitled. The practice was utterly unknown at common law and, although grand juries have in recent times occasionally invited persons, whose conduct they are examining, to appear, they are never obliged to do so."

Response to Petitioner's Question 5

Petitioner contends he has been placed in jeopardy in violation of the Fifth Amendment to the Constitution of the United States.

Jeopardy does not attach in this case. The contention is premature and the question cannot be raised in a habeas corpus proceeding.

> "Jeopardy does not arise until after the (trial) jury is properly impaneled." Wharton, Criminal Law and procedure, § 138 (1957 Ed.); *Conero v. United States*, 48 F.2d 69 (9th Cir, 1931).
>
> "The defendant is not placed in jeopardy when the (first) indictment is void." Wharton, Criminal Law and Procedure, § 139 (1957 Ed.).
>
> "Grand jury may on the evidence already received on the finding of an indictment, return a second indictment for the purpose of correcting a defect of form." Wharton, Criminal Law and Procedure, § 1735 (1957 Ed.).
>
> "The issue of double jeopardy cannot be raised by a habeas corpus proceeding." *Barker v. State of Ohio*, 328 P.2d 582 (6th Cir. 1964).

CONCLUSION

The petitioner is untimely in filing his petition for certiorari and has not shown that he has been denied any right, privilege or immunity as guaranteed by the Constitution of the United States. He seeks review from the wrong decision and has not shown where there is any decision of the Nevada Supreme Court that is in conflict with a decision of this court. Respondent respectfully requests that the petition be denied.

Respectfully submitted this 6th day of March, 1968.

HARVEY DICKERSON
Attorney General of Nevada

Attorney for Respondent.

APPENDIX A

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

STATE OF NEVADA, *Appellant,* vs. W. MARK EDDINGTON, et. al, *Respondents.*

No. 5364

APPLICATION FOR STAY OF PROCEEDINGS IN THE COURTS OF NEVADA

TO THE HONORABLE BYRON R. WHITE, *Associate Justice of the Supreme Court of the United States*

Now comes the respondent, W. Mark Eddington, and moves the Court to enter an order staying execution and enforcement of a judgment in the above entitled case of the Supreme Court of the State of Nevada rendered the 25th day of September, 1967, for a reasonable time to enable respondent to apply for and obtain a writ of certiorari from the United States Supreme Court. The grounds upon which the said petition for certiorari will be based are as follows:

1. He was indicted by a state grand jury where at least one member was biased, prejudiced and had a financial interest in the subject matter encompassed in the indictment.

2. The prosecutors were biased and prejudiced and withheld evidence from the grand jury in their possession which was favorable to respondent and contradicted evidence presented to the state grand jury.

3. Illegal evidence was presented to the state grand jury in violation of the state statutes of Nevada and the statutes of the United States of America.

4. The Supreme Court of Nevada has decided federal questions of accused's constitutional rights in a way in conflict with applicable decisions of this Court.

5. The safeguards of the Fifth, Sixth and Fourteenth Amendments of the United States Constitution have been violated.

6. The statutes under which grand jurys operate in the State of Nevada are unconstitutional and in violation of the rights granted by the United States Constitution.

The reasons why the stay is deemed necessary are as follows:

1. The order of the Supreme Court of Nevada reversed the previous order of the District Court Trial Judge who issued a Writ of

Habeas Corpus for respondent and the State of Nevada through its prosecutors, whose conduct herein is sought to be reviewed, have expressed their intention to prosecute with dispatch respondent under the state indictment issued by a state grand jury.

2. Justice requires that respondent be afforded the opportunity to present his petition to this court for a writ of certiorari to review the unconstitutional statutes of Nevada, the unlawful and prejudiced conduct of grand jury members and state grand jury counsel and the presentation and use of illegal evidence before a state grand jury.

3. To afford respondent his constitutional rights and due processes of law.

Your petitioner further represents that through his counsel, Robert W. Hughes, a request for a stay of execution was made by a telephone call to the Chief Justice of the Nevada Supreme Court, Justice Thompson, on the 19th day of October, 1967, and Justice Thompson related that his court would not issue a stay upon the grounds that no federal questions were involved. Further, counsel for respondent was authorized by Justice Thompson to set forth his refusal in this court in this application for a stay in this matter.

In support of this application respondent incorporates the certificate of counsel Robert W. Hughes with Madison B. Graves of Morse and Graves of Las Vegas, Nevada.

I hereby certify that it is the bona-fide intention of respondent to make application to the Supreme Court of the United States for a writ of certiorari within the next 90 days and that I believe there is merit in respondent's case and that the judgment of the Supreme Court of Nevada ought to be reversed by the Supreme Court of the United States.

/s/ Robert W. Hughes
ROBERT W. HUGHES
425 Newhouse Building
Salt Lake City, Utah

MADISON B. GRAVES of
MORSE & GRAVES
116 South 4th Street
Las Vegas, Nevada

PROOF OF SERVICE

I certify that I mailed a copy, postage prepaid, of the above Motion for a stay on this 20th day of October, 1967, to the following:

Harvey Dickerson, Attorney General of the State of Nevada
Daniel R. Walsh, Deputy Attorney General
Carl F. Martillaro, Special Deputy Attorney General, of Carson City

I further certify that I attached thereto a letter, a copy of which is annexed hereto and by reference made a part hereof.

/s/ Robert Hughes

APPENDIX B

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C., 20543

October 31, 1967

DANIEL R. WALSH, Esq.
Chief Deputy Attorney General
Carson City, Nevada 89701

Re: *Eddington v. Nevada*

DEAR MR. WALSH:

I have your letter of the 26th enclosing your opposition to the application for stay in the above-entitled case. The application together with the opposition were presented to Mr. Justice Douglas, who has denied the application.

Very truly yours,

JOHN F. DAVIS, Clerk

By: /s/ *E. P. Cullinan*
E. P. CULLINAN
Chief Deputy

EPC:njf